The ANTITRUST BULLETIN

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- ANTITRUST NEWSLETTER

FEDERAL LEGAL PUBLICATIONS, INC.

Vol. 1, No. 9
FEB.-APRIL, 1956

The
ANTITRUST BULLETIN

Vol. 1-No. 9
February-April, 1956

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Published by Federal Legal Publications, Inc., 95 Morton Street, New York 14, N. Y. Issued bi-monthly. Subscription price $17.50 for six issues. Per copy: $3.00. This special combined issue $6.00.

In Memoriam

The death of Senator Harley M. Kilgore of West Virginia, on February 28, 1956, was a severe loss to those who believe that changing economic conditions have hade necessary revision of the antitrust laws in order to make them both fair and effective. When he became Chairman of the Senate Judiciary Committee in January, 1955, Senator Kilgore took note of the increasing criticism that the antitrust laws were inconsistent and uncertain, and inadequate to achieve the basic objective of maintaining a free competitive enterprise system. He became Chairman of the Antitrust and Monopoly Subcommittee, which emabrked upon the most comprehensive study and investigation of the antitrust laws since TNEC. Just prior to his death, he had received a draft of a report prepared by the staff covering the study and hearings which had been conducted by the subcommittee.

Throughout his sixteen year tenure as Senator, he was noted for his vigorous opposition to monopolies, cartels, and restraints on competition. Nevertheless, he believed it was the responsibility of Congress to make very effort to eliminate the uncertainties, inconsistencies, and conflicts which had developed over a 65-year period. His prior experience as a country judge found expression in his view that the antitrust laws should be written so that a reasonably competent attorney could advise his client with a reasonable degree of certainty what he could or could not lawfully do.

In both his assignments, as Chairman of the full Judiciary Committee and the Antitrust and Monopoly Subcommittee, Senator Kilgore was in a key position to make his influence felt on antitrust matters. His death will be felt keenly by all those in the antitrust field.

PRINTED IN THE UNITED STATES
BY
RECORD PRESS, INC.
NEW YORK CITY

SOME TWILIGHT ZONE ANTITRUST PROBLEMS

by

EDWARD R. JOHNSTON*

No doubt many of you will say that most antitrust problems, because of the generality and vagueness of the Statutes, are in the twilight zone. In a sense that is true. Because of the difficulty frequently encountered in applying even well-settled antitrust law to the complicated facts usually present in this type of case, uncertainty will often exist as to whether the challenged conduct is or is not illegal.

I have in mind, however, those areas where the antitrust laws have either not as yet received judicial interpretation or where substantial dispute exists as to the meaning and scope of the Courts' decisions or the soundness of their rationale.

THE SHERMAN ACT

The Sherman Act, because it has been on the statute books for 65 years, has naturally been subjected to more extensive review than the later antitrust laws. Yet controversy still exists as to the meaning, scope and application of Sections 1 and 2 in a number of important fields of commercial activity. I will discuss a few of these controversial subjects.

(a) *How far will the courts apply the per se rule and conclusively presume a conspiracy between competitors unreasonable?*

The general statement of the doctrine is that agreements between competitors to fix prices[1] or which substantially affect the price structure[2] are illegal *per se*. The rule is said to be equally applicable

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* Johnston, Thompson, Raymond & Mayer, Chicago.

Ed. Note: This article is in essence the core of an address delievered by Mr. Johnston at St. Paul, Minn. for the Regional Meeting of the American Bar Association.

1 *United States* v. *Trenton Potteries Co.*, 273 U. S. 392.

2 *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U. S. 150.

to arrangments between competitors to limit production, apportion markets[3] or exclude competitors from a market.[4]

But none of these generalizations are wholly true. Even an agreement between competitors to fix prices may, under certain special circumstances, be legal. In *Board of Trade* v. *United States*[5] the rule of the Board prohibiting purchases after the close of business at any price other than the closing bid was held not to offend Section 1 because the enforcement of the rule had no appreciable effect on general market prices, nor on volume. So in *Appalachian Coals, Inc.* v. *United States*[6] the agreement of the bituminous coal operators in the Appalachian district to sell their product through a common selling agent, which fixed the price for all producers in the area, was held lawful as not having an anti-competitive effect on the general market and as a justifiable device in a depressed market. In both of these cases the Supreme Court in effect applied the rule of reason indicating that even where price is the subject of agreement the Court may inquire (1) whether defendants have enough market power to make the restriction on price competition an "undue restraint" and (2) whether they are exercising that power or intend to do so.

While it is probably true that arrangements between competitors to limit production or to divide markets stands on much the same footing as price agreements, the same is not true of understandings the purpose or effect of which is to exclude competitors from a market. The broad generalization by Mr. Justice Jackson in the *International Salt Co.*[7] case that "it is unreasonable, *per se,* to foreclose competitors from any substantial market" is not, I respectfully submit, an accurate statement of the law. Exclusive territorial dealership agreements obviously exclude competitors from a market, yet many such agreements are perfectly lawful.[8] The Supreme Court in the *Columbia Steel* case,[9] commenting on the *Yellow Cab* case, said that nothing in

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[3] *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211; *Timken Roller Bearing Co.* v. *United States.*

[4] *Fashion Originators' Guild* v. *Federal Trade Com.,* 312 U. S. 457; *International Salt Co. Inc.* v. *United States,* 332 U. S. 302.

[5] 246 U. S. 231.

[6] 288 U. S. 344.

[7] 332 U. S. 392, at p. 396.

[8] See *United States* v. *Bausch & Lomb Optical Co.,* 321 U. S. 707.

[9] *United States* v. *Columbia Steel Co.,* 344 U. S. 495, at 523.

that decision "supports the theory that all exclusive dealing arrangements are illegal *per se*." Indeed, where an exclusive dealership arrangement can be said to be reasonably necessary to protect the lawful business purposes of the parties and is not a part of an attempted monopolization of fixing of prices, it will generally be sustained.

Without multiplying instances of market exclusion which may nevertheless be lawful, the point which I desire to emphasize is that you cannot entirely divorce the rule of reason even in the consideration of those cases where it is claimed that the violations are *per se* illegal. The growth of the *per se* rule stems in large part from the desire of the courts to avoid the vexations and difficulties incident to an examination and evaluation of economic facts. How, say the Courts, can we determine the reasonableness of a price or of allocations of markets. Yet whether the restraint imposed by the challenged conduct is undue and in fact injures competition is the very inquiry which the courts must make wherever the rule of reason has even limited application.

The Department of Justice, quite understandably, is constantly pressing for an expansion of the *per se* rule. The Antitrust Division would not agree with some of my comments here. But I respectfully suggest that you do not allow the shibboleth of *per se* violation to deter you from examining the economic background of the challenged activities to determine, at least, whether the defendants have the power to impose undue restraints as charged, and whether they are exercising or intending to exercise that power to the injury of competition.

(b) *Is evidence of conscious parallel action by competitors sufficient to establish a conspiracy under Section 1?*

The doctrine that uniformity of action by competitors, if known to those engaged in the trade, is the equivalent of overt collusion originated in the Federal Trade Commission. It came to fruition in the *Triangle Conduit* case,[10] where the Commission induced the Court of Appeals for the Seventh Circuit to fully support its theory of "conscious parallelism." The affirmance of the *Conduit* case by

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[10] *Triangle Conduit & Cable Co.* v. *Federal Trade Commission*, 168 Fed. 2d 175 (7th Cir. 1948).

the Supreme Court by a divided court, without opinion,[11] gave further impetus to the Commission's theory and induced many lawyers to conclude that a conspiracy to violate the Sherman Act could be established merely by showing identical conduct by competitors, each knowing what the other was doing.

Since the reorganized Federal Trade Commission has now, apparently, repudiated "conscious parallelism," it is perhaps incorrect to refer to it as a disputed interpretation of the antitrust laws. Moreover, the Supreme Court, in the *Theatre Enterprise* case,[12] went out of its way to announce that " * * * this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offence."

Nevertheless, there are some lawyers, largely in academic circles, who still give support to the doctrine that mere conscious uniformity should in many cases be enough to establish unlawful agreement. The test of agreement is whether in fact the parties did tacitly or expressly agree. Uniformity in prices and uniformity in terms of sale are frequently the result of competition rather than conspiracy. The market price of most homogeneous basic products inevitably seeks a common level since the product of one producer cannot be sold for more than the product of his competitors. Moreover, discounts and other terms of sale are often the result of custom and practice in the industry and again competition generally compels uniformity. And, of course, each competitor, if he is a live competitor, knows the prices and terms of sale of his fellow competitors. There is no economic justification for the doctrine that uniform business behavior must stem from agreement and certainly no legal justification for adopting the theory of conscious uniformity as conclusive proof of conspiracy. I think we can safely say, therefore, that the doctrine of "conscious parallelism" no longer has judicial support, which is not to say, however, that uniformity of conduct between competitors lacks significance. It may be and often is potent evidence tendering to establish conspiracy.

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11 *Clayton Mark & Co.* v. *Federal Trade Commission*, 336 U. S. 956 (1949).

12 *Theatre Enterprises, Inc.* v. *Paramount Film Dist. Corp.*, 346 U. S. 537, at p. 540.

(c) *How far have the Courts gone in sustaining charges of intra-corporate conspiracies under Section 1.*

No court has held in a Section 1 case, so far as I am aware, that a corporation and its officers, acting on its behalf, can be guilty of conspiring to restrain trade. Some lower Federal courts have held to the contrary.[13] But a different rule may apply where the agreement is between a parent and its subsidiaries or between companies controlled by a common ownership. It comes as a distinct shock to most lawyers to be told that an agreement between a parent company and its subsidiaries or between subsidiaries governing the future conduct of company business may constitute a conspiracy to restrain trade in violation of Section 1 although the same conduct by a company and its officers and agents is legal. Yet, in effect, that is what the Supreme Court of the United States held in 1951 in the *Kiefer-Stewart* case.[14] There a conspiracy to fix a maximum resale price for liquor sold by two distillers, one of which was the wholly-owned subsidiary of the other, was sustained. The case did not turn upon the fact that the fixing of resale prices was unlawful but upon the agreement of the defendants to sell only to those wholesalers who observed the maximum resale price regulations. The Court admits that either defendant acting individually might have refused to deal with wholesalers who resold liquor at prices above the maximum but, said the Court, " * * * the Sherman Act makes it an offence for respondents to agree among themselves to stop selling to particular customers."

To me it is difficult to understand why something which a corporation may lawfully do by arrangement with its agents, employees or branch houses becomes illegal when a wholly-owned subsidiary is involved. The fact that the two defendants in the *Kiefer-Stewart* case were handling different brands of whiskey and held themselves out as competitors seems to have carried some weight with the Court, but the decision was squarely rested on the proposition that "common ownership and control does not liberate corporations from the impact of the antitrust laws."

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[13] *Nelson Radio & Supply Co.* v. *Motorola,* 200 Fed. 2d 911 (5th Cir. 1952); *Union Pac. Coal Co.* v. *United States,* 173 Fed. 737 (8th Cir. 1909).

[14] 340 U. S. 211.

The decision in *Kiefer-Stewart* was forecast by what the Supreme Court had decided in the earlier *Yellow Cab* case.[15] There the corporate defendants were controlled by a single individual, although his control was by no means absolute. The charge was a violation of both Sections 1 and 2, so that establishment of conspiracy was not essential to the validity of the complaint if the United States chose to rely on Section 2. However, the Court left no doubt as to its position on the subject of conspiracy, saying that unreasonable restraint " * * * may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent."

In the most recent decision of the Supreme Court on this subject, *Timken Roller Bearing Co.* v. *United States,*[16] the Timken Company was charged with conspiring in violation of Section 1 with two foreign corporations, in which Timken was a very substantial stockholder (50% in one corporation and 30% in the other), to divide world markets for antifriction bearings. The majority of the Court again decided that " * * * common ownership or control of the contracting corporation does not liberate them from the impact of the antitrust laws."

Justice Jackson, in a dissenting opinion, puts his finger upon what seems to me to be the fundamental fallacy in the rule announced in *Kiefer-Stewart.* After pointing out that Government counsel admitted that the Timken Company, acting through separate departments or agents, could have lawfully done everything that it was charged with conspiring with its subsidiaries to do, said, page 606: "The doctrine now applied to foreign commerce is that foreign subsidiaries organized by an American corporation are 'separate persons,' and any arrangement between them and the parent corporation to do that which is legal for the parent alone is an unlawful conspiracy. I think that result places too much weight on labels." I agree. But we are faced with a condition and not a theory. How are you and I to advise our corporate clients with respect to the legitimate scope of their relationship with their subsidiaries?

It is difficult to define the limits of lawful agreements between parent companies and their subsidiaries because, as Justice Jackson

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15 332 U. S. 218 (1947).

16 341 U. S. 593.

points out, the doctrine of intra corporate conspiracy defies logical analysis. In general I should say, all normal inter company arrangements are valid unless they are entered into for the purpose or have the necessary effect of unduly restraining the trade of those outside the corporate family. This, I appreciate, is a delightfully vague generalization, but it is the best I can do in applying decisions which, so far as they rest on the doctrine of intra-enterprise conspiracy, seem to me to be unsound.

(d) *Section 2 of the Sherman Act.*

It is easy to state the definition of monopolization as the Supreme Court has defined it. It is the power to control a market coupled with the intention to exercise that power. The troublesome question is how much power to control must be shown in order to bring a single company or a group of companies within the ban of Section 2. I know that the courts have said that the power to control market prices or exclude competition is the earmark of monopoly control[17] but this does not help very much.

Where actual control of prices or actual exclusion of competitors from a market is established there is, of course, no difficulty in finding that both the power to control and the intent to exercise that power were present. But the Supreme Court held in the second *American Tobacco* case[18] that actual exclusion of competitors from the market need not be shown in order to establish monopolization. A survey of the Section 2 cases that have been reviewed by the Supreme Court, however, discloses that in each case either (1) a conspiracy between competitors to monopolize or (2) the actual exercise or attempted exercise of monopoly powers was involved. In such cases the evidence of what the defendants have actually done may be evaluated in much the same way that similar facts are weighed in a Section 1 case.

But how about the case where the power to control has not been exercised to the extent of actually excluding or attempting to exclude competitors or actually controlling prices? By what means may the existence of monopoly power in such a case be determined? Some commentators say that mere size—dominant position in the industry—

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17 *Standard Oil of New Jersey* v. *United States*, 221 U. S. 1; *American Tobacco Co.* v. *United States*, 328 U. S. 781; *United States* v. *Griffith*, 334 U. S. 100.

18 328 U. S. 809.

is sufficient evidence that monopoly power exists. Others would place reliance upon the percentage of business controlled as the determining factor. You may recall the famous dictum of Judge Learned Hand in the *Aluminum* case[19] to the effect that ninety per cent constitutes a monopoly, sixty or sixty-four per cent is doubtful, and thirty-three per cent is not enough. I submit that there is no single test by which the existence of unexercised monopoly may be determined. The best summation of the tests to be applied that I know of is contained in the *Columbia Steel* case,[20] where the Court said:

> "In determining what constitutes unreasonable restraint * * * we look rather to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development in the industry, consumer demands, and other characteristics of the market."

In short, the Court should apply the rule of reason and evaluating all the pertinent factors, determine whether the market control in question imposes an undue restraint upon competition and whether an intention to impose that control upon the market is present. The intent, by the way, need not be a specific intent, except in the case of a charge of attempt to monopolize, but may be established by showing that monopoly power was unlawfully acquired or was maintained by illegal practices or persistent design, that is, by abuse of power. To establish the requisite intent, it is necessary that there be proof, as the Court pointed out in the *Griffith* case,[21] that the defendant "has acquired or maintained his strategic position or sought to expand his monopoly or expanded it by means of those restraints of trade which are cognizable under Section 1."

It is interesting to note that the Supreme Court has before it for decision the *Du Pont Cellophane* case, where the District Court in dismissing the Government's petition alleging violation of Section 2, relied[22] upon the existence of competition from other materials than

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19 *U. S.* v. *Aluminum Co.*, 148 Fed. 2d 424.

20 *United States* v. *Columbia Steel Co.*, 334 U. S. 495.

21 *U. S.* v. *Griffith*, 334 U. S. 108.

22 *U. S.* v. *Du Pont*, 118 Fed. Supp. 41.

cellophane as establishing lack of monopoly control. The Department of Justice has never been willing to concede that producers of substitute products are often as effective competitors as those producing the same line of products as the defendants. The decision by the Supreme Court of the *Du Pont (Cellophane)* case should clarify this question.

II.

THE CLAYTON ACT

While there are many open questions, so far as the Clayton Act is concerned and particularly as to Section 2 (the Robinson-Patman Act), I will only touch on a few.

(a) *Exclusive Dealing Arrangements.*

Section 3 of the Clayton Act covers two general classes of cases: (1) agreements which place limitations upon the buyer's dealing in the goods of competitors of the seller, and (2) so-called tying contracts whereby the sale of one product is tied to the purchase of another product.

There is a very natural desire on the part of the producers of many products to establish exclusive dealers for their goods in the several markets in which they operate. The primary purpose of these exclusive dealing arrangements is to insure adequate and wholehearted representation of the seller's products in a particular market. This purpose is laudable and, indeed, in many cases unless such exclusive dealerships can be established, distribution of a particular product is seriously impeded.

On the other hand, where a dominant producer succeeds in appropriating most of the eligible distributors in a given market so that competitors are in fact excluded from such market, it seems obvious that there is a restraint of trade. The test of illegality largely depends upon the construction to be placed upon the language of Section 3 limiting the prohibitions of that section to those cases "where the effect of such lease, sale or contract for sale or such condition, agreement or understanding may be substantially to lessen competition or tend to create a monopoly in any line of commerce."

In addition to exclusive dealership agreements, one of the most common methods of insuring exclusivity is the use of requirement contracts. Such contracts effectively give to the seller for the term of

the agreements the right to supply the buyers requirements of specified products to the exclusion of competing sellers. Yet requirements contracts are long-established commercial devices, often of great benefit to buyers in assuring an adequate supply, affording protection against price increases and in general facilitating long-term business planning. They may and often do permit sellers to effect such savings in manufacturing and sales expense as to significantly effect the selling price of their products.

It is obvious, therefore, that before such agreements can be condemned as substantially lessening competition or tending to create monopoly there should be a factual survey of the market affected and a determination of the effect on the competitive opportunities of actual or potential business competitors and the public generally of the challenged agreements.

Yet if we are to accept the teaching of the leading Supreme Court decision construing Section 3 as it relates to exclusive dealing arrangements—the *Standard Stations* case[23]—we are precluded from examining the significant economic and business facts bearing upon whether or not actual foreclosure of competitors from the market has resulted or will result from the questioned contracts. The Court there states the issue to be whether competitive injury is established simply by proof that a substantial portion of commerce is affected or whether it must also appear that competitive activity has diminished or probably will be diminished. The Supreme Court adopted the first alternative and announced the "quantitative substantiality" rule. In substance this rule would condemn exclusive dealing arrangements as illegal *per se,* provided the amount of interstate commerce effected was substantial, regardless of their actual or potential effect upon the market.

I am unable to accept the *Standard Stations* case as a correct interpretation of Section 3. It seems to me that the substantiality of the lessening of competition or tendency to monopoly to which Section 3 refers is not to be determined by the quantity of goods affected by the particular contract but by the extent to which that contract forecloses competitors from a market. It may well happen that exclusive dealing contracts of a large producer do not susbtantially impair the competition opportunities of other producers. The

[23] *Standard Oil of California* v. *United States,* 337 U. S. 293.

suggestion of the court in the majority opinion in *Standard Stations*, that courts are ill-suited to examine and determine the economic factors bearing upon the probable market exclusion resulting from requirement contracts is unrealistic. The courts are required to do just that wherever the rule of reason is to be applied in an antitrust case. Courts are called upon every day to examine complicated factual situations, many of which involve the analysis of economic data.

I was much encouraged when the Federal Trade Commission in the *Maico* case[24] refused to follow Standard Stations and required an examination of the economic evidence bearing upon the competitive effects of the exclusive dealing contracts there involved; also by the remarks of Mr. Justice Frankfurter, who wrote the majority opinion in *Standard Stations*, in his dissenting opinion in the *Motion Picture Advertising Service* case.[25] His analysis of Standard Stations in that dissent seems to cast doubt, at least, as to the validity of the "quantitative substantiality" rule.

Yet when the Federal Trade Commission last year came before the Circuit Courts of Appeals in the *Dictograph*[26] and *Anchor Serum*[27] cases, they prevailed upon those courts, by way of dicta, to reaffirm the doctrine of the *Standard Stations* case. Despite these decisions, I still believe that the "quantitative substantiality" test is unsound and that if the issue is again squarely presented to the Supreme Court, that Court will refuse to follow its prior decision to the extent, at least, of permitting quantity alone to be the determining factor as to the legality or illegality of exclusion-dealing arrangements. Those arrangements should be found to violate Section 3 only where, after full factual analysis, it appears that competitors have been or probably will be foreclosed from access to a substantial share of the market by reason of the challenged agreements.

(b) *Tying contracts.*

It would seem that tying contracts, which are not specifically referred to in Section 3 but are covered by the general provisions of that Section, would be governed by the same legal principles applicable

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24 *The Maico Co. Inc.*, F. T. C. Dkt. 5822.

25 *F. T. C.* v. *Motion Picture Advertising Co.*, 344 U. S. 392, at 401-3.

26 *Dictograph Products* v. *F. T. C.*, 217 Fed. 2d 821.

27 *Anchor Serum Co.* v. *F. T. C.*, 217 Fed. 2d 867.

to exclusive-dealing agreements. The Courts, however, have not always so treated them. A typical tying case is where the owner of a patent licenses the use of the patent or sells the patented product upon the agreement of the licensee or purchaser to use with the patented product an unpatented product manufactured or sold by the licensor or seller. The basis of the illegality in such an arrangement lies in the fact that by reason of the dominance exerted by the patent monopoly purchasers may be forced to buy an unwanted product in order to secure the dominant product.

In the *Times-Picayune* case,[28] decided by the Supreme Court in May of 1953, the tying cases are thoroughly explored and the rationale of those decisions analyzed. As the opinion in that case points out (p. 614) "The common core of the adjudicated unlawful tying arrangements is the forced purchase of a second distinct commodity with the desired purchase of a dominant 'tying' product, resulting in economic harm to competition in the 'tied' market." It seems obvious that absent a dominant product no pressure is or can be exerted by the seller on the prospective buyer. If both the tying and the tied product are freely available in the market, no buyer is forced to purchase either product. As the Court said in the *Times-Picayune* case, "the essence of illegality in tying agreements is the wielding of monopolistic leverage." Without the existence of such leverage there would seem to be no basis for charging an unlawful tying arrangement.

Yet we find the Circuit Courts of Appeals for the 1st, 4th and 6th circuits[29] holding that an illegal tying arrangement was established although no dominance of a tying product was found to exist. And we find the Supreme Court in the *Times-Picayune* case concluding that a tying agreement violates Section 3 of the Clayton Act wherever the supplier "enjoys a monopolistic position in the market for the tying product, *or* if a substantial volume of commerce in the 'tied' product is restrained." If the Court meant by this statement that a tying agreement involving a substantial volume of trade in the tied product, even though neither product involved enjoyed a monopolistic or

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28 *Times Picayune* v. *United States*, 345 U. S. 594.

29 *Thomason Mfg. Co.* v. *Federal Trade Com.*, 150 Fed. 29, 952; *Signode Steel Strapping Co.* v. *Federal Trade Com.*, 132 Fed. 2d 48; *Oxford Varnish Corp.* v. *Ault & Wiborg Corp.*, 83 Fed. 2d 764.

dominant position, then I respectfully disagree. There is no logic in the position that because the volume of trade is large the seller wields a monopolistic leverage.

Suppose, for instance, a large manufacturer of mechanical refrigerators decides as a sales device to sell his refrigerators only in conjunction with a food locker. Both refrigerators and lockers are freely available from numerous other manufacturers. No one is forced to buy the two products unless he prefers to do so. Is any unlawful tying arrangement involved? I think not.

Nor can I agree with the dictum of the Court in the *Standard Stations* case that "tying agreements serve hardly any purpose beyond the suppression of competition." I will agree that most tying agreements involve a dominant product and that such dominance may result from patents, advertising or anything else that gives to the seller a monopolistic position. But there are legitimate uses for tying arrangements as sales incentives and where the products involved are readily available in the market from others, so that there is no monopolistic leverage exerted upon buyers, I fail to find a basis for declaring such contracts unlawful.

Moreover, one charged with violating Section 3 by entering into tying agreements should have the right to introduce evidence to show that such agreements would not have the probable effect of lessening competition or tending to create monopoly. If, as I have indicated, the test should be the existence of a dominant product, then the proof should go to that issue. But if the "substantial volume of commerce in the tied product" is the test, then there should be no distinction between an exclusive dealing contract and a tying contract so far as the character and extent of permissible evidence is concerned. I realize that this position does not agree entirely with the Attorney General's Committee Report, but I respectfully dissent as I did in discussions in Committee meetings.

III.

The Robinson-Patman Act

The most controversial antitrust law is the Robinson-Patman Act, now Section 2 of the Clayton Act. The reason is obvious. It is poorly drafted, conflicting in some of its provisions and predicated, in part at least, upon a philosophy alien to that which underlies the Sherman

Act. However, the political implications of the Robinson-Patman Act are such that I doubt whether we can look forward to corrective amendments for some years.

There is no corporation, large or small, which is engaged in interstate commerce that is not subject to the provisions of the Act in its every-day business transactions. The section of most universal application is 2(a), prohibiting discrimination in price between different purchasers of commodities of like grade and quality. The questions that I am most frequently asked by clients respecting the application of Section 2(a) are:

(1) Do mere differences in price to competing buyers prima facie constitute discrimination?

(2) How am I to determine what goods are of like grade and quality?

(3) How can I show that the differences in price are justified by differences in the cost of manufacture, sale or delivery?

(4) How about my right in good faith to meet the equally low prices of a competitor?

These are but a few of the troublesome questions raised by Section 2(a). They happen, in my experience, at least, to be the ones most frequently asked.

For many years the answer to the first query was yes. Following the decision of the Circuit Court of Appeals for the Second Circuit in the *Moss* case,[30] the Commission took the position that once a differential in price was shown in sales to competing buyers the burden of demonstrating that competitive injury did not result shifted to the seller. The Commission has now abandoned that position and in the *General Foods Co.* case[31] flatly held that counsel supporting a complaint alleging price discrimination had the burden of proof to establish the injury, since differences in price without competitive injury is not an offense. There is also some support for this view in recent Federal cases.

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[30] *Moss* v. *Federal Trade Com.*, 148 F. 2d 378 (2d Cir. 1945). See also *Federal Trade Com.* v. *Standard Brands*, 189 Fed. 2d 510 (2d Cir. 1951).

[31] *General Foods Co.*, F. T. C. Dkt. 5675 (1954).

The answer to the second question is more difficult. There have been few authoritative interpretations of the phrase "like grade and quality." The issue is frequently presented where substantially identical goods are sold under established brand names and under private labels. The Commission currently takes the position that brand names and labels are not sufficient to differentiate goods as not of like grade and quality.[32] I quite agree that the purpose of the Act is to confine price discriminations to comparable business transactions and that mere nominal differences should not be enough to justify price differentials, but I have difficulty in treating goods which through advertising and the long-established use of brand names have established a strong consumer preference, in the same category as the same goods when sold unbranded or under a private label. However, as the law now stands the answer to query (2) is that the differences which will take the case out of Section 2(a) must be actual physical differences which are recognizable by those engaged in the industry and capable of reasonable demonstration.

The answer to question (3) is, unfortunately, that in most cases the seller cannot demonstrate to a mathematical certainty the differences in the cost of manufacture, sale or delivery. The books of a manufacturer or wholesaler are not generally kept on a basis which would permit the segregation of these elements of cost between, for instance, large and small sales. As the Supreme Court pointed out in the recent *Automatic Canteen* decision[33] "Proof of a cost justification being what it is, too often no one can ascertain whether a price is cost justified."

The only relief which is possible under the cost justification proviso must come from a realistic approach to the problem by the Commission, absent a clarifying amendment of the statute. Fortunately, the Commission is attempting to arrive at some practical solution through the activity of a special committee and through a recognition in some of the pending cases that the cost defense is not susceptible of proof by precise technical accounting rules. I have hopes that this effort may result in giving the proviso some meaning in practice, which it significantly lacks today.

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[32] *Goodyear Tire and Rubber Co.*, 22 F. T. C. 232; *U. S. Rubber Co.*, 46 F. T. C. 998; and *E. Edelmann & Co.*, F. T. C. Dkt. 5770.

[33] *Automatic Canteen Co.* v. *Federal Trade Com.*, 346 U. S. 61 (1953).

The last question under Section 2(a) to which I will refer is the defense of meeting a competitive price. The scope of this defense has fortunately been somewhat clarified by the decision of the Supreme Court in 1951 in the *Standard of Indiana* case.[34] There the Court, contrary to what it seemed to have decided in the earlier *Staley* case,[35] held that a showing in good faith that the sales in question were to meet the equally low price of a competitor was an absolute defense, even though incidental injury might result therefrom. Some notty construction questions remain, however. Must the price of the competitor be a lawful price, and must the seller go no further than meet the competitor's price? May he undercut it?

The common sense answer to the first of these queries is, that unless the seller knows that his competitor's price is unlawful he should be protected in meeting that price. Likewise, his defense should not fail because his quoted price is not the exact equivalent of the price which he is attempting to meet. The answers to these questions, however, await further clarification by the courts.

Time will permit of reference to only two more problems posed by the Robinson-Patman Act: (1) the legality of functional discounts and (2) delivered pricing. A functional discount is one granted to a buyer in consideration of the functions which he performs as a distributor of the seller's goods. The usual functional discount is that granted to wholesalers or jobbers. If service functions are performed by the buyer, there should be no difficulty in sustaining the granting of a discount or commission. After all the true wholesaler is not competing with the retailer. The amount of such discounts may become important if there are variances between purchasers in the same class. It is frequently impossible to accurately measure the dollar value of the functions performed by these middlemen. The only suggested test is the reasonableness of the discount measured by the general character of the services performed.

The most troublesome problem is presented where the buyer is both a wholesaler and a retailer. May he receive the functional discount on all his purchases or must the seller differentiate depending on how the buyer sells the purchased goods? The Commission has endeavored to determine the legality of the functional discounts to

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34 *Standard Oil Co. (Indiana) v. Federal Trade Com.*, 340 U. S. 231 (1951).

35 *Federal Trade Com. v. Staley Mfg. Co.*, 324 U. S. 746 (1945).

such multiple-function distributors by limiting the discounts depending on how the distributor functions as a seller rather than the functions which are performed by him in buying the goods. This effort culminated in the Commission's decision in *Standard Oil of Indiana*, to which I have referred in another connection. In that case, as you may recall, jobbers who sold to consumers were classified as retailers and obligated to pay the same price as other retailers. The impracticability of requiring the supplier, when selling to a wholesale-retailer, to determine just how his customer intends to sell the goods purchased, is obvious. It would seem that where the wholesaler actually performs a wholesale function and thereby relieves his supplier of the risks and costs incident to direct distribution, his right to a functional discount should not be affected by the fact that he also performed other functions, including sale at retail of some part of the goods purchased. In the case of *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, at p. 475, however, the Supreme Court affirmed the Commission's order which prohibited differences in price to "purchasers who in fact compete" regardless of the fact that some of the purchasers performed in part wholesale functions. Thus the Commission can claim some support for its position.

Delivered pricing becomes important because of the fact that many sellers, in order to meet competition in distant markets or for other sound business reasons, sell their goods at a delivered price. The Federal Trade Commission evolved the theory that "selling price" as used in Section 2(a) of the Robinson-Patman Act meant the sellers mill net return—what he actually received net for his goods less the cost of transportation. They actually induced the Supreme Court in the *Cement* case to give support, by way of dicta at least, to this theory.[36] Since freight costs vary, depending on the location of the buyers, a delivered price theoretically gives an advantage to the more distant purchaser and disadvantages the purchaser near the point of shipment. There never was, in my opinion, any justification for the attempted definition of selling price as the sellers mill net return. It is only differences in the actual prices at which the goods are sold with which Section 2(a) is concerned. Competitors who buy at the same delivered price cannot complain of competitive injury because the seller absorbs some of the costs of delivery as to certain

36 333 U. S. 683.

buyers and receives more than the actual costs from others. Buyers are only interested in the cost to them of the product they are buying. Fortunately, the Commission in its recent *National Lead* and *Chain Institute*[37] cases abandoned the "mill net" theory and adopted the common sense view that only difference in the actual prices at which the products are sold are important.

Since geographic pricing is widely used in industry, particularly zone pricing of nationally distributed goods, it is important to have had this issue clarified by the Commission. There always remains, of course, the question of conspiracy to maintain uniform delivered prices, which is primarily a Sherman Act case.

Having now sufficiently confused you with this cursory discussion of what the Courts and the Commission have held the law to be affecting some of these twilight zone problems and what I think the correct view should be as to some of them, I yield to the panel discussion which is to follow and which, I hope, will bring you more light than I have been able to shed on these troublesome questions.

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[37] F. T. C. Dkt. 5253; F. T. C. Dkt. 4878.

THE CELLOPHANE LABYRINTH

by

JOEL B. DIRLAM*

and

IRWIN M. STELZER**

Because of the government's extreme position in the briefs and arguments in the *Cellophane* case,[1] and the reaction to that position both in the District Court and in the comments[2] on the case, it will repay careful study by both lawyers and economists concerned with the frontiers of anti-trust policy. The economist will find much in the decision relevant to the problem of measuring the effect of substitutes on the degree of monopoly power. He will also discover a wealth of information in the 381-page opinion[3] to help him determine if pricing and product characteristics of the cellophane industry satisfy his favorite criteria for workable competition. For his part, the lawyer will enjoy the opportunity to reexamine, in the light of the decision, his post-Alcoa hypotheses on the standards of proof required to show a violation of Section 2 of the Sherman Act.

The briefs, the opinion and the comments on it do, however, present teasing questions of public policy; their importance transcends the problem of determining either the precise place of the case in the history of anti-trust legal doctrine or its contribution to refinements of the theory of workable competition. Does the prominence given to industry or firm performance in the opinion represent, as at least one economist has suggested,[4] a "victory for our profession?" Alter-

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* Associate Professor of Economics, University of Connecticut.

** Lecturer in Economics, New York University.

1 *U. S.* v. *E. I. duPont de Nemours and Co.*, 118 F. Supp. 41 (1953).

2 George W. Stocking and Willard F. Mueller, "The Cellophane Case and the New Competition," 45 *American Economic Review*, 29 (March, 1955).

3 In the unofficial print.

4 Cited in Stocking and Mueller, *loc. cit.*, p. 30. See also Milton Handler, "Monopolies, Mergers and Markets—A New Focus," *Trade Regulation Series Number* 1 (New York: Federal Legal Publications, 1954), pp. 18, 25, and 39ff.

natively does it prove that bad economics makes bad law, and that the decision would have gone against duPont if Judge Leahy had been better instructed in his fundamentals of imperfect competition?[5] Should the government have tried to rest its case narrowly on the mere existence of monopoly power, on the ground that this power, standing alone, was illegal, without demonstration even of intent to use or abuse it? More broadly, can the courts in anti-trust cases ever permit their decisions, even under Section 2, to turn on purely economic tests, whether of structural measurement of the degree of monopoly, or more complex appraisals of workable competition?

It is the contention of this article that both the defenders and the critics of the *Cellophane* decision[6] have misunderstood the role of economics in anti-trust cases. Guilt or innocence in Sherman Act cases must inevitably be determined by the courts from an application of the traditional legal appraisal of the character of conduct, and its associated intent.[7] That the anti-trust implications of behavior and intent must of course be interpreted against a background of analysis of economic power of the firm and structure of the industry, goes without saying. But economic conclusions about the degree of monopoly power, or workability of competition, should never be decisive in antitrust cases.[8] It is the authors' view, in other words, that a great deal of misdirected effort has been used in trying to fit norms required for judicial anti-trust decisions into the value system of a different discipline.

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[5] This seems to be the position taken by Stocking and Mueller, *loc. cit.*, and generally, although less consistently and dogmatically, by Stocking in "The Rule of Reason, Workable Competition and Monopoly," 64 *Yale Law Journal*, 1107 (1955).

[6] Cf. Jerrold G. Van Cise, "The Principle of Customer Indifference," *Trade Regulation Series Number 1* (New York: Federal Legal Publications, 1954), pp. 42-43, and Handler, *loc. cit.*, on the one hand, with Stocking and Mueller, *loc. cit.*, on the other.

[7] For a more detailed development of this thesis, see Joel B. Dirlam and Alfred E. Kahn, *Fair Competition: The Law and Economics of Anti-Trust Policy* (Ithaca Cornell University Press, 1954). An interesting presentation of another viewpoint appears in George W. Stocking and Myron W. Watkins, *Monopoly and Free Enterprise* (New York: Twentieth Century Fund, 1951), pp. 256-313.

[8] It is our view that this thesis can be supported in the face of the *Alcoa, Standard Stations* and *United Shoe* decisions. See Dirlam and Kahn, *op. cit.*

Judge Leahy's Decision

As the Court viewed the Government's complaint, it centered about the charge that duPont monopolized the production of cellophane. This involved two questions: 1. Did duPont possess monopoly power? and 2. If so, had it achieved such power by monopolizing within the meaning of the Sherman Act and the *Alcoa* case? This division of issues enabled the Court to state that unless the first issue was decided against the defendant, i.e., absent monopoly power, the second "is not reached."

The ensuing decision consisted largely of 854 findings of fact on matters of detail, ranging from duPont's acquisition of process patents to an examination of the numerous end-use markets in which cellophane is sold, all leading to the conclusion that defendant did not possess illegal monopoly power. Nevertheless, Judge Leahy went on to make additional findings not necessary to his holding against the Government. He found that duPont had not abused its market power, that the origin of whatever control duPont did possess was lawful, and that it had maintained its position (which was far from that of a monopolist) through skillful and efficient application of its technical discoveries to mass production and marketing.

The *Cellophane* decision did not, therefore, rest primarily upon a conclusion that because the company had satisfied some economic criteria associated with workable competition it could not have violated the Sherman Act. The Judge's consideration of duPont's market performance (an integral part of the measurement of workable competition) was subsidiary to his conclusion that it was pointless to discuss the monopolization of cellophane because the cellophane market was so narrow that the product could not in any meaningful sense be said to be monopolized.

The Consequences of the Government's Pleadings

That the economic issue of measurement of monopoly power should have become of crucial importance in the *Cellophane* case itself requires explanation. DuPont's domestic and foreign patent policy had certain similarities to the pattern that courts condemned in the *National Lead,*[9] *General Electric* (lamp)[10] and *Imperial*

[9] *National Lead* v. *U. S.*, 332 U. S. 319 (1947).

[10] *U. S.* v. *General Electric Co.*, 82 F. Supp. 753 (1949).

Chemical cases,[11] where the government successfully pressed charges of violation of both Section 1 and Section 2 of the Sherman Act. Why, then, did the complaint in the *Cellophane* case allege that duPont had transgressed only the standards of Section 2? And why, since all three allegations appeared in the complaint, did not the government in its briefs center its fire upon attempts to monopolize, or conspiracy to monopolize, instead of upon actual achievement of monopoly power?[12] Thus, in the trial, the government not only assumed the arduous task of proving actual monopoly power but neglected to complement its main attack by alleging restraint of trade in violation of Section 1. It was, therefore, owing in part to an accident of pleadings that, in holding against the government, the *Cellophane* opinion was focused on measurement of monopoly power.

The 73-page essay in which the government sought to elucidate both the distinctions among the numerous economic versions of workable and monopolistic competition and their relation to legal concepts of monopoly power[13] may also have contributed to its own defeat. For it clearly demonstrated that there were deep cleavages among the economists in their criteria of workable competition and objectionable monopoly. Judge Leahy did not explicitly adopt one or another of the authorities spread before him, but earlier anti-trust decisions favorable to the government had relied upon simpler and more obvious economic analyses. The criteria of monopoly power that

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11 *U. S.* v. *Imperial Chemical Industries, Ltd.*, 100 F. Supp. 504 (1951).

12 Complaint, *U. S.* v. *E. I. duPont de Nemours and Co., Inc.*, Civil No. 5017-47, Dist. Ct. for the Dist. of Columbia, Dec. 13, 1947, Par. 21 and 22; *U S.* v. *E. I. duPont de Nemours and Co.*, 118 F. Supp. 41 (1953), Brief for the U. S., pp. 3-4. Attempted monopolization and conspiring to monopolize were to be proved by showing that duPont had acquired and possessed a "monopoly position in the manufacture and sale of cellophane." An "alternative" proposition—which was not a true alternative—was that, having a monopoly position, duPont had exercised it in predatory fashion.

13 Brief, pp. 4-77. The same presentation had been submitted to Judge Wyzanski in the *United Shoe Machinery* case. *Ibid.*, p. 4. Even in that case the government had alleged violation of Section 1 as well as Section 2. It is possible that the Anti-trust Division had become convinced hat, in the *Aluminum* decision, the legal test of monopoly had coalesced with the "kind of economic power which the economist regards as monopolistic" (E. V. Rostow, "The New Sherman Act: A Positive Instrument of Progress," 14 *Chicago Law Review* 575 (June, 1947)), although with complete impartiality duPont was said to have monopoly power by *any* economic theory.

had been convincing in the *Associated Press,*[14] *Alcoa*[15] and *American Sea Green Slate*[16] decisions might equally well have served here.[17] Judge Leahy's refusal to follow these earlier decisions may have had its roots as much in economists' failure, elaborately exposed in this section of the brief, to agree upon a single fundamental test of monopoly, as in the persuasive tongue of duPont's counsel.

In attempting to persuade the District Court, and then the Supreme Court, to go along with its theory that mere existence of monopoly power is illegal, the government was consciously pushing the *Alcoa* doctrine to its furthermost limits. It is possible that it was willing to risk loss of the Cellophane decision to get a high court ruling on the point. The mainstream of anti-trust doctrine has never condemned the mere economic fact of monopoly, and even Judge Hand contemplated situations in which monopoly power could escape the law.[18] Yet in its brief before the District Court, the government insisted that "once power to control prices has been established, it is immaterial how that power may be used." [19] Before the Supreme Court it insisted even more strongly on the point. Some 74 pages of its 94 page argument are devoted to proving the indisputable fact that duPont had monopoly power in the cellophone market, on the assumption that:

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14 *Associated Press* v. *U. S.*, 326 U. S. 1 (1945).

15 *U. S.* v. *Aluminum Co. of America,* 148 F. 2d 416 (1945).

16 *O'Halloran* v. *The American Sea Green Slate Co.*, 207 F. 187 (1913).

17 On page 81 of its Brief, the government was asking, along the lines of the "new competition," for research into "the structure, nature, and detailed workings of the market place." In so doing it really weakened its case by indicating a need for going beyond the undeniable fact that control of "as distinctive a product as cellophane, whose annual sales figures run over $100,000,000; whose distinctive name, Cellophane, long since has become a descriptive byword in the eyes of the American public; and yet whose purchases can be had [only] from duPont and two other minor sources of supply," must have conferred monopoly power. *Ibid.*, p. 93.

18 See discussion of the *Alcoa* opinion in Dirlam and Kahn, *op. cit.* Admittedly, it is possible to read this decision to support the position of the government in the *Cellophane* case. But it is also possible to interpret it as Judge Leahy did.

19 District Court Brief, p. 140.

"The statute is violated when there is power to dominate and control commerce in any article which is a distinctive item of trade." [20]

This extreme position taken by the government in trying the *Cellophane* case makes it hard to argue that, whatever be the character of the economic analysis of Judge Leahy, his decision was bad law. The government was relying on an unexplained premise. When it argued that it need only prove "monopoly power," it assumed an equivalence between this and "illegal" monopoly power. Its assumption was not only that monopoly can be designated as an economic fact, existing apart from and regardless of whatever law may be applied to it,[21] but that a demonstration of the fact could be carried over, without transmutation, into a judicial decision hostile to the monopolist.

Another curious procedural feature of the *Cellophane* case should be noted. In view of duPont's unquestioned control of the patents on moistureproof cellophane,[22] (which out-sells plain cellophane about 6 to 1)[23] elaborate proof of its monopoly power would seem to

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20 Supreme Court Brief, p. 76. See also the exchanges between the Justices and the government's attorney, on oral argument, of which the following is representative:

> Justice Reed: When you consider power to exclude you must also consider intent.
> Mr. Weston: Power to monopolize is enough.
> Justice Reed: Power alone?
> Mr. Weston: Yes. . . .

240 U.S.L.W. 3102, October 18, 1955.

21 Cf. opinion by Chairman Howrey, in *The Matter of Pillsbury Mills, Inc.*, FTC Docket No. 6000, Dec. 28, 1953, p. 10. We are not sure, in spite of Howrey's dogmatism, that monopoly is ever demonstrable as an "economic fact" in any absolute sense.

22 It is, after all, difficult to disagree with the holding that "Powers which are granted under a *valid* patent are not powers on which plaintiff may rely to establish monopolization. Mere possession of a *validly* issued patent cannot be made the basis for a prosecution under the monopoly provisions of the Sherman Act. Plaintiff cannot rely to prove power or intent, upon acts *lawfully* undertaken to exploit the patent. . . . The holder of a patent is, in accordance with the patent laws, permitted to exert monopoly control over what he has created." 118 F. Supp. 214. Our italics indicate the possibilities such a statement still left open to the government. In all fairness, of course, it should be pointed out that certain passages in the government's Supreme Court brief indicate some new awareness of this issue.

23 *Ibid.*, p. 41.

belabor the obvious. But the valid patents provide at least a *prima facie* rebuttal to the charges in the form in which they were cast by the government, and the court so found. Recognition of the strength of this defense should have led the government, again following the *National Lead* and *Imperial Chemical* precedents, to build its argument around the conspiracy and cartel elements of its case, rather than the existence of monopoly power.[24]

Without trying to dispute the possibility that conflicting conclusions may be drawn from the *Aluminum* opinion, it can be shown that recent cases in which monopoly power and the measurement of the relevant market were crucial issues confirm the rather trite hypothesis that full measure of judicial discretion will nearly always be compounded with the conventional economics of market analysis. Justice Black in ruling that the AP gave a "competitive advantage" even though newspapers could have gotten along without its news service;[25] Judge Hand in rejecting in two sentences the possibility that the existence of many substitutes for aluminum in its various uses might detract from Alcoa's monopoly;[26] Justice Douglas in narrowing the relevant movie market from "exhibition" to "first-run theatres";[27] Justice Clark, first in excluding radio and television advertising from the "narrow circle" of the market for New Orleans newspaper advertising and then in combining morning and evening paper advertising.[28] None of these felt it incumbent upon him to provide ultimate economic justification for their findings of market relevancy. The recent attempt of the Attorney General's committee to extract precise rules from anti-trust experience further indicates that,

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[24] The blindness of the government on the patent issue is demonstrated by its lawyer's statement to the District Court (Oral Argument, Tr. p. 6330) that "it is difficult to perceive in what manner a demonstration can be made that the existence of the patent was *in any way* responsible for or by any means justified, duPont's dominant position in this industry." (Italics added.)

[25] *Associated Press* v. *U. S.*, 326 U. S. 1, 17-18 (1945).

[26] *U. S.* v. *Aluminum Co. of America*, 148 F. (2d) 416, 425-426 (1945). Judge Knox, while pointing to the competition offered aluminum by "steel, copper, zinc, lead, tin, wood, textiles, plastics, paper, clay, glass, leather and cork" nevertheless disregarded these substitutes in his analysis of market power. *U. S.* v. *Aluminum Co. of America*, 91 F. Supp. 333, 335 (1950).

[27] *U. S.* v. *Paramount Pictures*, 334 U. S. 131, 166 (1948).

[28] *Times-Picayune Pub. Co.* v. *U. S.*, 345 U. S. 594, 611-612 (1953).

when push comes to shove, the "established facts in the particular case at issue" rather than "economic analysis" must govern individual "criminal guilt or civil responsibility." [29] And this same Committee, endeavoring to arrive at a definition of the market useful in Section 2 cases, emerges (as indeed it must) with the smooth but unhelpful generalization that "more than a limited number of buyers should be able within reasonable variations in prices to buy either the product or the substitute." [30]

It may be argued that in some cases, such as *Pullman,*[31] *American Tobacco,*[32] and *United Shoe,*[33] there could have been little arbitrariness in selecting the relevant market. Cellophane, however, is not in the same category as shoe machinery, cigarettes, or sleeping car service in degree of separation from close substitutes. The government should have realized that, in order to demonstrate that the flexible wrapping materials market is significantly broader than the market for aluminum, or New Orleans morning and evening newspaper advertising, and the cellophane market not appreciably narrower, it would have to abandon reliance on proof of mere existence of monopoly power in cellophane.

Workable Competition as an Anti-trust Standard

The mere existence of monopoly, in spite of the ease with which the concept can be defined,[34] has been shown to be unreliable as a weapon in the anti-trust arsenal. The more recent concept of workable competition, even prior to its appearance in the *Cellophane* briefs and opinion, was actively proposed as a substitute for what was conceived to be a *per se* attack on certain business practices,

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[29] *Report of the Attorney General's National Committee to Study the Antitrust Laws* (Washington, 1955), p. 340.

[30] *Ibid.*, p. 47. Is it pure chance that the chapter of the *Report* dealing with "Economic Indicia of Competition and Monopoly" should be separated from Chapter I, surveying policy under Sections 1 and 2 of the Sherman Act, by all but the final chapter?

[31] *U. S.* v. *Pullman Co., et al.,* 50 F. Supp. 123 (1943).

[32] *American Tobacco Co.* v. *U. S.,* 328 U. S. 781 (1946).

[33] *U. S.* v. *United Shoe Machinery Corp.,* 110 F. Supp. 295 (1953).

[34] See any elementary economics text.

and as the modern equivalent of the "rule of reason." [35] It was just as vigorously rejected as an instrument of anti-trust analysis because of difficulties in showing that any industry was not workably competitive. It therefore was thought to offer unparalleled opportunities for evasion of the anti-trust laws.[36] Without enquiring into the consequences of relying on exclusively economic tests in anti-trust cases,[37] nor exhibiting awareness of the dangers that had been pointed out of the employment of this particular concept, two economists proceeded to attack the *Cellophane* decision simply on grounds that competition in cellophane was not workable.[38] Later, one of the economists attempted to apply the workable competition standard to two other cases.[39] Since the analysis in the earlier article

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[35] See Blackwell Smith, "Effective Competition: Hypothesis for Modernizing the Antitrust Laws," *26 New York University Law Review* 405 (1951); S. Chesterfield Oppenheim, "Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy," 50 *Michigan Law Review* 1139 (1942); Business Advisory Council, U. S. Department of Commerce, *Effective Competition* (Washington, 1952).

[36] See Walter Adams, "The Rule of Reason: Workable Competition or Workable Monopoly?," 63 *Yale Law Journal* 348 (1954); Dirlam and Kahn, *op. cit.*

[37] In Hans Thorelli's *The Federal Antitrust Policy* (Baltimore: Johns Hopkins Press, 1955)—cited at length and with approval by Stocking in his "The Rule of Reason, Workable Competition and Monopoly," 64 *Yale Law Journal* 1107 (1955)—it is pointed out that (1) the Sherman Act had a social purpose as important as its economic one of preserving competition and (2) Congress was never able to resolve the problem of disposing of the firm that dominated a field innocently.

[38] Stocking and Mueller, *loc. cit.* It should be understood that we do not intend to imply that Stocking and Mueller are solely responsible for the attempt to prove, by economic analysis, that duPont violated Section 2 of the Sherman Act. The Government in its briefs followed much the same line of reasoning, using the same supporting data.

[39] Professor Stocking's purpose in the *Yale Law Journal* article is not quite clear, nor is it consistent with his *American Economic Review* article. In the latter, he concludes unhesitatingly that the Cellophane decision was founded on error. Yet in the *Yale Law Journal* the following statements appear: "To determine how much restriction on competition by private enterprise can be justified on economic grounds is an almost insuperable task, even for economists" (p. 1122). "But unfortunately monopoly is a no more precise term than restraint of trade" (p. 1124). ". . . (T)he principle [workable competition] may be a treacherous guide to courts not schooled in the intricacies of economic analysis" (p. 1136). "The district court would have been on sounder ground had it concluded that cellophane has been sold under conditions of workable monopoly . . ." (p. 1147). Thus the senior author of the *American Economic Review* article had apparently lost some of his earlier assurance about the precision and usefulness of the workable competition

is much more detailed, our comments are based to a large extent on it. Professors Stocking and Mueller conclude that duPont had a (presumably illegal) monopoly because of the kinds of business strategy it used, its pricing, and the level of its profits. At the same time they adopt a definition of workable competition that is apparently identical with Chamberlin's "sort of ideal," where there is tangency, for firms producing under conditions of monopolistic competition, between the average revenue and average cost curves.[40]

In his *Yale Law Journal* article, Stocking is much less rigid, and mixes indefinite quantities of ingredients of structural, performance, and behavior attributes to concoct a *pot-au-feu* workable competition. Both his discussions and the government's District Court Brief traverse much the same ground.

But the case for duPont, as it is elaborated in the opinion of Judge Leahy, seems to meet the Stocking-Mueller arguments so effectively that it serves to prove the uselessness of the workable competition test rather than Judge Leahy's economic ineptitude. It also confirms our fear that to inject workable competition into the rule of reason must lead to endless bickering, not only among the economic experts, but between them and the courts.

The major vulnerable elements in duPont's strategy were its attempt to get cellophane classified under the Tariff Act of 1920 (passed before it acquired cellophane) in such a way as to increase the rate, its patent exchange agreements with Kalle, British Cellophane, and Sylvania, and its territorial arrangements with La Cellophane. While, superficially, an attempt to get foreign cellophane excluded by tariff reclassification might seem to be a deviation from

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concept when he came to write the *Yale Law Journal* article. Even here, he is not quite clear about the function of economic analysis. While insisting that appraisal of motives is out of place, and attacking the rule of reason as applied in the Standard Oil case, which made "illegality synonomous with bad conduct" (p. 1123), he comes finally to the conclusion that the courts should rely on intent, deduced from a course of conduct, in moving against "oligopolistic structures that do not meet the tests of workable competition" (p. 1161). "What business firms are up to is relevant in determining whether they violate the law." Cf. Dirlam and Kahn, who state, "The unescapable conclusion is that, from a practical standpoint, the criterion of intent alone 'fills the bill' for a sensible antitrust policy in many of these cases." "The evidence of intent is mainly objective behavior; and its content is a description of what the defendants were doing." *Op. cit.*, pp. 51 and 53.

[40] Stocking and Mueller, *loc. cit.*, p. 45.

the performance tests implied by the concept of workable competition, it could be argued (á la Schumpeter) that the protection permitted duPont to enjoy the sheltered market necessary to call forth long-term capital and improve the quality of its product. (According to the court, the foreign cellophane was of such poor quality it could not have been successfully imported even without the tariff.) Although the company did observe the territorial limitations of its cross-licensing agreements until 1940, it did not do so after that date. Nor did it ever join the cellophane cartel. Its original agreement with La Cellophane restricting its sales territories might have been excused on the grounds that this was the only way it could get the original patent and secret processes. And it eventually stood ready to license any domestic producer at reasonable royalties under the moistureproof patents. True, its discussions with Sylvania eventuated in a restriction on the output of a competitior, but Sylvania never seems to have produced even its quota, so it is not wholly clear whether, or the extent to which, competition actually was limited by this agreement. Furthermore, even after quota restrictions were removed, Sylvania failed to gain on duPont. According to the court, this was attributable to "the superior quality of duPont cellophane, and the value to its customers of its creative merchandising and technical service." [41]

Stocking concludes that duPont's efforts to protect itself from competition were evidence of the strategy of a monopolist—and hence the industry could not be workably competitive.[42] But part of this strategy consisted of patenting improvements that enchanced cellophane's "usefulness as a wrapping material." [43] This ambivalence again illustrates the impossibility of relying on workable competition as an anti-trust standard. The same acts that may appear to impede entry also contribute to raising quality.

It is not easy to follow Stocking and Mueller's argument on product differentiation. Although they begin by making a strong case for the physical differentiation of transparent films from other

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[41] *U. S.* v. *E. I. duPont de Nemours and Co.*, 118 F. Supp. 41 (Findings 309, 315-320, 323). The court gives many instances of direct competition between Sylvania and duPont. (Findings 310-314.)

[42] 64 *Yale Law Journal* 1140.

[43] *Ibid.*, p. 1139.

flexible wrapping materials,[44] they recognize that cellophane, though a transparent film, nevertheless encounters severe competition from all flexible wrappings in its major market, food wrapping, so that their careful delineation of the transparent film market seems pointless. They concede that food packaging business shifts back and forth from one wrapping material to another with slight changes in product prices.[45] This seems to argue for a very high cross-elasticity of demand between cellophane and its substitutes in some areas. Cellophane has qualities of transparency, impermeability to moisture and machine running qualities not combined in any wrapping material save lacquered glassine,[46] but the nub of the problem is to prove, which Professors Stocking and Mueller do not attempt to do,[47] that cellophane enjoys in any markets save cigarettes, as much immunity from competition as aluminum ingot, the only morning newspaper in New Orleans, or first-run movie theatres. Unable to measure precisely the cross-elasticity of demand between cellophane and its substitutes, Stocking and Mueller are forced to turn to duPont's price policy to sustain their contention that the company enjoyed monopoly power.

Professors Stocking and Mueller deduce monopoly power[48] from two aspects of duPont's price policy. First, duPont continuously reduced its prices, from 1923 to 1947. There is no allegation that it practised price discrimination. Stocking and Mueller limit themselves

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44 Stocking and Mueller, *loc. cit.*, pp. 48-52.

45 This proclivity of buyers to discontinue the use of cellophane if their costs rose slightly weighed heavily with the court. It discussed the demand for wrapping material for 17 product categories, accounting for 90 percent of duPont's sales. Findings 173-278. A glassine manufacturer testified: "The people who use cellophane are excellent prospects for our papers, because the reasons that they would use cellophane in my opinion resolve into qualities which we can furnish in our material." Peter Paul had discontinued cellophane, according to a duPont salesman, because of a "saving of 25¢ per M wrappers at approx. $36,000 per year."

46 See the elaborate table relied on by the court, comparing 11 physical qualities of 14 wrapping materials competitive with cellophane. *U. S.* v. *E. I. duPont de Nemours*, 118 F. Supp. 41 (1953) (Finding 59).

47 Here again their curious reluctance to put the facts in the *Cellophane* case against a background of data in other antitrust proceedings drains their article of meaning.

48 Monopoly power—or some degree of it—is not wholly incompatible with workable competition. Hence, much of the discussion by Stocking and Mueller on prices does not seem wholly relevant to their thesis.

to saying that it lowered its prices, acting like a rational monopolist, in order to "maximize earnings." To Judge Leahy, the lowering of prices was evidence that duPont was competing by expanding its market, and by appealing to those users to whom the cost of cellophane was important.[49] Thus, at initial high prices there might have been a very low cross-elasticity between cellophane and all other flexible wrapping materials—so low, in fact, that no one would use cellophane for any purposes. At lower prices, this cross-elasticity was increased. To some economists and to the court, the resultant invasion of markets was competitive; to others, including Stocking and Mueller, monopolistic. The latter position is rooted in the apparent belief that a firm that has any price policy at all possesses monopoly.[50]

The second monopolistic feature of duPont's pricing is said to be its "independence." In order to establish a cellophane beachhead and then expand its share of the food market, the price of cellophane (its quality improving) had to be reduced 85 per cent over 16 years. Meanwhile the prices of other flexible wrapping materials remained substantially unchanged. From this failure of the competitive prices to respond to duPont's reductions, Stocking and Mueller conclude that "at no time did duPont compete with its most popular rivals on a price basis." [51] The only way one can reconcile duPont's actual price policy with Stocking and Mueller's description of it is to assume that by "competition on a price basis" they mean price uniformity. More puzzling is a subsequent criticism of duPont for not cutting prices even further.[52] Had it done so, winning an even larger share of the markets it was already supposed to be monopolizing, would Stocking and Mueller have found workable competition?

In his discussion of Cellophane pricing, Stocking moves imperceptibly from the use of the workable competition standard to a

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[49] *U. S.* v. *E. I. duPont de Nemours and Co.*, 118 F. Supp. 41 (1953), (Findings 123-149).

[50] It is hard to interpret otherwise the statement that it is immaterial whether a firm decides to raise prices to maximize profits, or finds it has to reduce costs and lower prices to maximize earnings. Stocking and Mueller, *loc. cit.*, p. 54. See also p. 54, note 95, which sets up *pure* competition as a standard.

[51] *Loc. cit.*, p. 56.

[52] *Loc. cit.*, p. 57. DuPont's failure to bring average cost and demand into coincidence is said to be evidence of monopoly.

different criterion: that of pure competition. Thus he tries to isolate the characteristics of a *monopolist's* pricing, and then to show how duPont confirmed to this pattern in pricing cellophane. But the workable competition standard never asserted that firms would not have power over price; it merely stressed the offsetting benefits to society that might come from absence of cut-throat pricing, or from quality competition. Hence, some of the discussion of the economist-critics of the decision is not wholly relevant to their theme.[53] The independence of the movement of duPont's prices and those of rival materials does not necessarily show absence of workable competition —particularly when duPont was apparently cutting its prices relative to other firms. And loss of their markets to duPont seems to demonstrate again, contrary to Stocking's belief,[54] a high cross-elasticity of demand.

It is interesting, as a further indication of the slipperiness of the workable competition concept, that in discussing the *structure* of the cellophane industry, Stocking devotes most of his attention to *prices* and *quality*—which would, by some economists, be regarded as indicia of a firm's performance.[55]

The quality of duPont's performance in cellophane is said to be inversely related to the rate of return on investment. According to Stocking and Mueller, profits were so high as to preclude a workably competitive market. In the absence of any general agreement on what industries are workably competitive, we may have to accept Stocking's conclusion that cellophane earnings were monopolistic. Nevertheless, the only industry he gives as a basis for comparison is textiles, which is notorious as an unworkably competitive sick industry.[56] It is difficult to find a workably competitive industry for comparative purposes—particularly since Stocking finds steel, cans (and presumably any others with an oligopolistic structure) not workably competitive. Firms in the automobile industry show wide variations in earnings.

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[53] Cf. Stocking in 64 *Yale Law Journal* 1143.

[54] Cf. *Ibid.*, p. 1144.

[55] *Ibid.*, pp. 1142-1144.

[56] American Viscose earned 70 per cent on its investment in the first eleven years of its rayon exploitation, duPont 37.9 per cent on cellophane. Earnings in the eleventh year were 64.5 per cent in rayon as against 24 per cent in cellophane. Brief for Appellee, Supreme Court, p. 110. Cellophane net for 1937-1947 was 15.9 percent.

Would this prove that competition is workably competitive for Studebaker and Kaiser, and not so for General Motors?

Further demonstration, if any is needed, of the impossibility of reliance on the workable competition test is provided by Professor Stocking's own analysis of the steel industry. A great deal of material is brought together to provide a negative answer to the question, "Have the Steel Corporation's and the industry's performances been compatible with the principle of workable competition?" [57] It would be difficult to disagree—and U. S. Steel would be the last to do so[58]—that before its reorganization the Corporation "was a big, sprawling, inert giant, whose production operations were improperly coordinated; . . . with less efficient production facilities than those of its rivals; and slow in introducing new processes and new products." [59] But does it follow that an anti-trust suit, "based on the rule of reason and the principle of workable competition" [60] (presumably Stocking is not referring to the traditional rule of reason with its emphasis on intent) would have proved successful? One might reasonably contend that U. S. Steel's decline, in light of its poor performance, is itself evidence of the workability of competition in the industry. Need the law be used to punish the firm which has already had its poor performance leave it with a substantially reduced market share? Further, if the Corporation had been so efficient that it maintained its dominant position, Professor Stocking would probably stand ready to ask for conviction under his (and Dean Rostow's) interpretation of the *Alcoa* decision. Finally, since U. S. Steel has admittedly revamped its operations after a period of its own agonizing reappraisal,[61] would not an anti-trust policy based on workable competition now require aquittal?

Without carrying further the summary of the defense that could be constructed for duPont's cellophane activities, it should be apparent

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57 64 *Yale Law Journal* 1132.

58 See Myron Taylor, "Ten Years of Steel," *Iron Age*, April 7, 14, 28 and May 5, 1938.

59 64 *Yale Law Journal* 1135.

60 *Ibid.*, p. 1136.

61 In Professor Stocking's words, "The corporation has reorganized, modernized, and expanded its facilities and operations at a cost of hundreds of millions of dollars, and Fairless' modest contention that the corporation is today as efficient as any of its rivals . . . seems reasonable." *Ibid.*, p. 1136 n.

that the government and those economists who feel that doctrines of "the new competition" can supply decisive answers in anti-trust cases have misunderstood the role of economic analysis in anti-trust cases, and exaggerated the usefulness of the workable competition concept. Proof that will demonstrate to an economist the existence of monopoly power—like a patent—is far from showing illegal monopoly power. But a proof that some (unquantified) degree of monopoly power has been economically misused—which is what the concept of unworkable competition seems to mean for anti-trust purposes—is something that rarely be relied upon to convince anyone but its author, let alone a court of law. An economist reaching a decision about the workability of competition must take care to weigh high profits, or monopolistic business strategy, against cost reductions, use of sales engineering, and similar praiseworthy activities. Judge Leahy found evidence that duPont had achieved and employed its monopoly—if it had one—innocently, because of its "(i)ntense research activity, market development, and expansion of productive capacity," and entitled this section of his opinion "DuPont Competed by Research to Improve Quality and Lower Cost." [62]

It is possible to sympathize with the effort made by the government and Stocking and Mueller to shape the concept of workable competition into a useful tool of anti-trust practice. But the attempt to lend it respectability has, we feel, simply confirmed the suspicions of its critics. It is useless as a touchstone in determining guilt or civil responsibility under the Sherman Act. It may possibly be of greater service in Federal Trade Commission proceedings; this is not the place to explore the question. But certainly its ambiguity would appear to make it equally unfit for determining whether specific business practices violate the law, and will simply compound the administrative task if the Federal Trade Commission has to determine whether business practices or mergers "substantially" lessen "workable" competition.[63]

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[62] *U. S.* v. *E. I. duPont de Nemours and Co.,* 118 F. Supp. 41 (1953), (Findings 80-122).

[63] It seems fair to say that the lamentable inactivity of the FTC in enforcing Section 7 of the Clayton Act is as much due to what seems to be an identification of the rule of reason with workable competition as to insufficiency of funds. As envisaged by the ex-chairman of the FTC, to find lessening of competition would involve the integration of some 16 economic factors! "Coalescence of Legal and Eco-

The Proper Role for Economic Analysis

Economics can be useful in reaching some decisions, but it should not be determinative in making legal decisions. In selecting cases for action, the Federal Trade Commission and the Anti-trust Division might be guided in part by judgments of the value of a proposed action in furthering economic welfare. In allocating the scarce resources of these agencies, the possibility, if a case is won, of accomplishing a substantial improvement in the intensity of competition in one sector of the economy should be a prime consideration. Yet even here, too much reliance on the subtilties of workable competition may lead to inaction (as it apparently has in the case of the FTC). For administrators, simpler rules are perhaps more useful in the long run. Thurman Arnold's selection of industries for mass anti-trust attack could be defended on the old-fashioned structure and behavior tests which the Attorney General's Committee on the Anti-trust Laws suggests as indicia to measurement of monopoly.

Economic analysis also has a role—and it should here be a dominant one—in the fashioning of decrees. Selection of those remedies that will be most effective in eliminating barriers to competition is not a legal task. Even in this area, it is not clear that workable competition can actually be of much assistance to an economist trying to eliminate obstructions to competition. While the tendency of the economist who emphasized structure tests of monopoly might be to stress the use of divorcement or dissolution,[64] the effect of using a workable competition guide could only be to moderate, never to strengthen, proposed remedies.

What of the *Cellophane* case? Was it economically justifiable to bring the suit? DuPont had received the initial patents on plain cellophane and secret processes under an agreement that limited its overseas sales territory. It observed this agreement, and as late as 1930, after the issuance of the moistureproof patent to duPont, it felt itself obligated to negotiate a revision of the initial agreement.[65]

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nomic Concepts of Competition," Address before the Section on Antitrust Law of the New York State Bar Association, January 26, 1955 (mimeographed), and In the Matter of Pillsbury Flour, FTC Docket No. 6000.

[64] See Walter Adams, "Dissolution, Divorcement and Divestiture, The Pyrric Victories of Antitrust," 27 *Indiana Law Journal* 1 (1951).

[65] *U. S.* v. *E. I. duPont de Nemours and Co.*, 118 F. Supp. 41(1953) (Findings 593, 621).

Although the basic process was of some value to duPont, it seems likely that it could have been duplicated by a somewhat larger expenditure of funds than was required to buy it from La Cellophane, in which case duPont would have been able to compete freely throughout the world, and La Cellophane might have tried to offer competition to duPont in the U. S. Patent agreements with Kalle and other foreign manufacturers prevented these firms from competing with duPont, yet these agreements were modifications of the control exercised by La Cellophane over its licensees. DuPont's program to obtain moistureproof patents, and its agreement with Sylvania undoubtedly were motivated by the same anti-competitive spirit that has sparked so many patent pools and research activities.[66] Yet so long as public policy supports our patent system, dilemmas of this kind will arise. Patents are not supposed, during their term of life, to intensify competition, and yet we encourage their use. Only to the extent that duPont's improvement efforts and the pool with Sylvania were evidence of an intent to monopolize a wider area than that covered by the patents, to extend control to competitors, would they be contrary to public policy. This question was never explored fully before the District or Supreme Court. From the economic standpoint, of course, there are objections to encouraging the granting of improvement patents merely to preserve an initial monopoly.

The obviously unique qualities of moistureproof cellophane conferred on its single producer the opportunity to enjoy handsome returns during the life of the patent. Once this period had elapsed, however, the Anti-trust Division should, if necessary to promote competition, be supported in efforts to reconstruct the market either by forcing duPont to divest itself of factories, or by encouraging licensing of competitors.[67]

Hence, from the facts of the case, the economist could have questioned the implications of the patent policy of the company, and on that basis perhaps have supported vigorous anti-trust action. And, if the government wins he can be of assistance in suggesting the technique that will most effectively promote vigorous competition in, and

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[66] See Government Exhibits 488 and 2811, cited by Stocking, *op. cit.*, notes 124 and 126.

[67] The complaint proposed divestment of factories.

wider use of, the product. But "workable competition" is not a perfect substitute for "restraint of trade" or "monopolization" as a touchstone of legality, nor can economic opinion, no matter how expert, relieve the courts of their ultimate responsibility in the trial of antitrust cases.

ANTITRUST NEWSLETTER

Supreme Court (Box Score) October 1955 Term (pending as of March 26, 1956)

Dkt. 5—*United States of America . E. I. de Pont de Nemours & Co.* (U. S. D. C., Delaware), June 23, 1954 Appeal filed. Oct. 14, 1954 Probable jurisdiction is noted. Motion to clarify and define the assignment of errors is denied. Mr. Justice Clark taking no part. Oct. 11, 1955 Oral argument was presented by counsel.

This case presents a question of whether the District Court committed error when, in determining whether duPont possessed monopoly power over trade, used as a basis of such determination the market for "flexible packaging materials" rather than the narrower market of cellophane. A second question presented is whether duPont possessed monopoly powers and, if so, was such power achieved or used in a manner condemned by Section 2 of the Sherman Act.

Dkt. 34—*Sears, Roebuck and Co.* v. *Bruce A. Mackey* (Seventh Circuit), Feb. 24, 1955 Petition filed. Mar. 28, 1955 Petition granted. Feb. 28, 1956, Oral argument presented and now awaiting decision.

The District Court in this action had ordered a dismissal of certain portions of the antitrust complaint without leave to amend and directed the entry of judgment as to dismissal. The court below held the order to be final and under the Rules jurisdiction was automatically conferred. Petitioner contends that the dismissal of some but not all claims does not automatically confer jurisdiction in the Court of Appeals.

Dkt. 76—*The Cold Metal Process Co.* v. *United Engineering & Foundry Co.* (Third Circuit), May 13, 1955 Petition filed. Oct. 10, 1955 Petition granted, and case assigned for argument immediately following No. 34. Oral argument in each case will be limited to 45 minutes a side. Case now awaiting argument.

The holdings and issues herein presently are substantially identical to those in Dkt. 34 as described above.

Dkt. 132—*Holophane Company, Inc.* v. *United States of America* (U. S. D. C., Southern Ohio), June 8, 1955 Appeal filed. Oct. 10, 1955 Probable jurisdiction is noted. Mr. Justice Harlan taking no part, and case now awaiting argument.

A principal question presented by this appeal is whether a district court, upon finding that an American company has conspired with foreign companies to divide world market in violation of Section 1 of the Sherman Act, has the upower to direct American company affirmatively to compete in the foreign territory which has been allocated to its co-conspirators.

A second question is whether contracts imposing territorial and other restrictions upon parties to the sale of a business are *per se* violations of the Sherman Act, and whether such contracts become *per se* unlawful when made between corporations formed under the laws of different countries and divide the geographical parts of the world in the markets among the contracting parties.

Dkt. 151—*United States of America* v. *E. I. du Pont de Nemours & Co. et al.* (U. S. D. C., Northern Illinois), June 14, 1955 Appeal filed. Oct. 10, 1955 Probable jurisdiction is noted, Mr. Justice Clark and Mr. Justice Harlan taking no part, and case now awaiting argument.

The questions presented are (1) did the acquisition of a controlling stock interest in automobile manufacturer by a chemical company coupled with participation in manufacturer's management have the probable effect of substantially lessening competition between the companies in violation of Section 7 of the Clayton Act, and (2) did the District Court commit error in its findings and conclusions that the chemical company's acquisition of stock and participation in management of the automobile company constituted a combination in violation of Section 1 of the Sherman Act.

Dkt. 410—*American Airlines, Inc.* v. *North American Airlines, Inc.* (District of Columbia Circuit), Sept. 21, 1955 Petition filed. Nov. 14, 1955 Petition granted, case transferred to summary calendar. March 6 and 7, 1956, Oral argument presented and now awaiting decision.

The question presented is whether the Civil Aeronautics Board when acting under Section 411 of the Civil Aeronautics Act of 1938, as amended (49 U. S. C., Section 491), had jurisdiction to enter an order directing respondent North American Airlines, Inc., operating in air transportation in competition with petitioner American Airlines, Inc., to cease and desist from using the name "North American Airlines, Inc.," "North American Airlines," "North American," or any combination of the word "American."

Dkt. 448–*United States of America* v. *McKesson & Robbins, Inc.* (U. S. D. C., Southern New York), Oct. 4, 1955 Appeal filed. Dec. 12, 1955 Probable jurisdiction is noted and case transferred to summary calendar.

The question presented is whether the McGuire Act exempts from the provisions of Section 1 of the Sherman Act, fair trade agreements between a manufacturer and independent wholesalers where the manufacturer itself sells at wholesale in competition with the independent wholesalers bound by the fair trade agreements.

Dkt. 485–*United States Gypsum Company* v. *National Gypsum Company* (U. S. D. C., District of Columbia), Oct. 24, 1955 Appeal filed. Jan. 16, 1956, noted Probable jurisdiction.

The question presented is whether, after a civil antitrust suit in which a conspiracy to fix prices by means of patent licensing had been charged by the United States against USG and its co-defendant patent licensees, a final decree is entered against defendants, but that final decree does not bar and the Department of Justice does not oppose suits by USG to recover reasonable compensation for use made by others of USG patents prior to entry of the final decree, the filing of such suits by USG against the co-defendant patent licensees in the antitrust suit constitute a misuse of USG patents.

Dkt. 558–*The Mac Investment Company* v. *The United States of America* (U. S. D. C., Eastern Michigan–So. Div.), Dec. 9, 1955 Appeal filed.

Judgment affirmed, *per curiam,* February 27, 1956.

Dkt. 642–*Students Book Co.* v. *Washington Law Book Co.* (Dist. of Col. Cir.), Jan. 26, 1956, Petition filed. *Certiorari* denied, March 12, 1956.

Dkt. 658—*North American Air Coach Systems, et al.* v. *North American Aviation, Inc.* (Ninth Cir.), Feb. 2, 1956, Petition filed and now awaiting action.

The question presented is whether it was error for the Court of Appeals to find as a matter of law that respondent, a user of unregistered trade name "North American," although engaged only in the manufacture of aircraft was entitled to the exclusive use of the trade name even in connection with air transportation to the exclusion of a company whose business is restricted to airline transportation and is not engaged in any competition with such user.

Dkt. 667—*Tractor Training Service, et al.* v. *Federal Trade Commission* (Ninth Cir.), Feb. 6, 1956, Petition filed and now awaiting action.

The question presented is whether the FTC may substitute Trial Examiners on the grounds of convenience and economy over defendant's objection which is based upon:

(a) The provisions of Sec. 11 (5 U. S. C. A., Sec. 1010; Federal Trade Commission Rule XIV) requiring that examiners "be assigned to cases in rotation . . ."

(b) The provision of Sec. 7(a) (U. S. C. A., Sec. 1006 (a); Federal Trade Commission Rule XV(d), specifying the circumstances in which a substitution of hearing examiners may be made.

(c) The provisions of Secs. 5(c), 7(b) and 8(a) (5 U. S. C. A., Secs. 1004(c), 1006(b), 1007(a); Federal Trade Commission Rules XIV (8) and XXII), requiring that the initial decision in a proceeding such as herein involved shall be made by the trial examiner who heard the evidence unless he shall have become "unavailable."

Dkt. 672—*Balian Ice Cream Co., et al.* v. *Arden Farms Co.* (Ninth Cir.), Feb. 8, 1956, Petition filed. March 26, 1956, Petition denied.

The questions presented are whether:

1. In a case of geographical price discrimination growing out of a blanket local price cut by a corporation which thereafter continued to maintain its higher prices in interstate commerce, it is in derogation of federal statute for a court to rule that, because the injury is locally sustained, local sellers competing with the discriminator have no claim for relief against such discriminators; and

2. in such a case, where the high-price leg of the discrimination was in interestate commerce and the low-price leg was local, it is in derogation of federal statute for a court to impose the requirement that the price differentials maintained by the discriminator are illegal only if they concern sales by the discriminator to purchasers who compete directly with each other.

Other Federal Courts

United States v. *Seafarers Sea Chest Corporation, et al.* (E. D. N. Y.). In a complaint filed in August, 1954, a dealer in ships stores (slop chest supplies) and a labor union were charge with unlawful combining to restrain and monopolize trade and commerce in the sale of slop chest supplies to ship owners operating from ports along the Atlantic seaboard and the Gulf of Mexico, in violation of Sections 1 and 2 of the Sherman Act.

In essence, the Government claimed that the Union was using its power as a labor organization to compel vessel owners to obtain their supplies from the defendant dealer which was owned by the Union, and to refuse to purchase such supplies from other dealers. The Government claimed that the unlawful restraints were in part accomplished through labor-management contracts. The court denied the defendants' motion to dismiss the complaint on the asserted claim of immunity from the antitrust laws on the basis of the Norris-La-Guardia Act and other labor statutes.

On March 20, 1956, a consent judgment was entered which requires the defendant Union to cancel the provisions of the collective bargaining contracts relating to the purchase of slop chest supplies from the defendant dealer. In addition to other injunctive provisions, the judgment enjoins the defendants from continuing to engage in the sale of slop chest supplies after five years, unless, after three years, they are able to establish to the satisfaction of the court that effective competition exists in the sale of slop chest supplies to vessel owners employing member of the defendant Union.

Department of Justice Activity

United States v. *J. P. Seeburg Corp.* (D. C. N. D. Ill.). A federal grand jury in Chicago March 2, 1956 indicted J. P. Seeburg Corporation, a Chicago manufacturer of coin operated phonograph ma-

chines, on charges that it had engaged in a combination and conspiracy with its distributors in restraint of trade in violation of Section 1 of the Sherman Act.

At the same time, the Department of Justice filed a civil antitrust action against J. P. Seeburg Corporation and its 31 distributors located throughout the United States. The civil action contains the same charges as are made in the criminal indictment.

The indictment and complaint describe the J. P. Seeburg Corporation as the largest manufacturer of coin operated phonographs in the United States. Retail sales of its machines are alleged to be at least $20,000,000 a year. According to the indictment and complaint, the distibutor defendants have entered into an agreement with Seeburg not to compete with each other in the sale of Seeburg products, and each distributor refuses to sell these products to persons located outside the territory allotted to it by Seeburg. In addition, it is charged that the distributor defendants refused to sell Seeburg products to "location owners" who are persons who operate restaurants, taverns and other places where coin operated phonographs are placed for use by the public. Further it is alleged that the distributors refuse to sell phonographs to any person who sells them to location owners. The result is, according to the pleadings, that location owners are compelled to obtain their machines on a loan basis from operators.

The civil complaint requests the court to issue an injunction preventing the defendants from imposing any restrictions upon the persons to whom, or the territories within which, Seeburg distributors may resell coin operated phonographs. In addition, the complaint asks for an order requiring the distributor defendants to sell Seeburg products to any person willing to pay cash.

Assistant Attorney General Stanley N. Barnes, head of the Antitrust Division, stated:

> "The indictment in this case charges that the Seeburg Corporation is a party to a scheme to boycott restaurant owners and other persons desiring to purchase coin operated phonographs. Boycotts have uniformly been condemned as a plain violation of the Sherman Act. In addition, the civil case filed today aims to break up the alleged non-competitive system of distribution utilized by the country's largest manufacturer of coin operated phonographs."

United States v. *Twentieth-Century Fox Film Corp., et al.* Attorney General Herbert Brownell, Jr., announced that the Department of Justice will not appeal the recent judgment of the Federal Court in Los Angeles holding that the defendant motion picture producer-distributors had not conspired to restrain the distribution of 16mm feature films to television and other outlets.

The decision not to appeal brings to an end civil antitrust litigation begun in 1952 in which the government had charged 12 motion picture producing and distributing companies with engaging in a conspiracy to restrain interstate commerce in feature films of 16mm width in violation of Section 1 of the Sherman Act.

The Attorney General pointed out that in recent weeks, five of the companies named as defendants in the action—RKO, Columbia, Warner Brothers, Universal and Republic—have licensed or sold over 1,800 features and westerns to television. In addition, there have been reports that the remaining defendants are currently engaged in negotiations for the release to television of an approximately equal number of features.

Mr. Brownell, in commenting on the decision not to appeal, stated that one of the principal objectives of the suit had been to make feature motion picutres available to television by removing allegedly illegal restraints on their sale to that medium. He stated that inasmuch as a substantial flow of feature motion pictures from major producers to television stations had started, continuation of the lititgation would serve no practical purpose.

United States v. *Erie County Malt Beverage Dist. Assn., et al.* A Federal Grand Jury at Pittsburgh, Pennsylvania, on March 19, 1956 returned an indictment charging Sherman Antitrust Act violations against two associations, one corporation and six individuals connected with the beer business in Erie, Pennsylvania.

Those named as defendants are:

Erie County Malt Beverage Distributors Association, an association of beer distibutors

Erie County I. D. Malt Beverage Association, an association of importing beer distributors

Kahkwa Brewing Company

The indictment charges that, since 1951, the defendants and co-conspirators have engaged in a combination and conspiracy pursuant

to which they agreed upon the prices, markups, and delivery charges at which case lots of beer would be distributed to home consumers in Erie County. It is alleged that the defendants and co-conspirators have induced and coerced others to adhere to the terms of the conspiracy and have boycotted nonconforming distributors and brewers.

Assistant Attorney General Stanley N. Barnes, head of the Antitrust Division said: Price fixing and boycotting competitors have long been held to constitute *per se* violations of the Sherman Act. The indictment was sought in line with the Department's announced policy of prosecuting such activities by criminal proceedings.

United States v. *Shell Oil Co.* (D. C. E. D. Mass., March 21, 1956). Attorney General Herbert Brownell, Jr., announced that a Federal grand jury sitting at Boston, Massachusetts, has returned an indictment charging the Shell Oil Company with a violation of Section 1 of the Sherman Antitrust Act. The indictment names as co-conspirators, but not as defendants, nine independent operators of Shell gas stations located in the area of Quincy, Massachusetts.

The indictment charges that Shell and the co-conspirators engaged in a combination and conspiracy to fix and make uniform the retail prices in the Quincy area of regular and premium Shell gasoline sold by the co-conspirator service station operators and by Shell's own retail gasoline station in the area.

According to the indictment the offense began about September 30, 1954 and continued until about November 17, 1954. It is alleged that the defendant and co-conspirators agreed on the specific price at which gasoline should be sold at retail, and also agreed that Shell would give a preferential price below its posted tank wagon price to the con-conspirator services station operators so long as they resold at the agreed upon retail prices.

Assistant Attorney General Stanley N. Barnes, head of the Antitrust Division, stated: "The indictment alleges that the individual liberty of trade of the co-conspirator service station operators was curtailed since each had to operate at a set gross profit margin, and that the judgment of the defendant Shell was substituted for that of the co-conspirator service station operator in deciding upon the retail prices at which the service station operator would resell his gasoline after he had purchased it from Shell. Combined action which produces effects such as those alleged in this case deprives

independent businessmen of their right to conduct their business as they see fit."

Federal Trade Commission Activities

FTC v. *General Foods Corp.* (FTC Dkt. 6018, Order, March 1, 1956).

The Federal Trade Commission ordered General Foods Corporation to stop discriminating in favor of contract wagon distributors ove wholesalers who compete in the multi-million dollar annual resale of General Food products to restaurants, hotels, hospitals and similar quality users.

In an opinion by Chairman Jonh W. Gwynne, the Commission ruled that General Foods gives the Institution Contract Wagon Distributors (ICWDs)) favored discounts in violation of Sec. 2(a) of the Clayton Act as amended by the Robinson-Patman Act and makes available to them institution packaged products not available to competing non-contracting wholesalers, in violation of Sec. 2(e) of that law.

The Commission's opinion, affirming an initial decision by Commission Hearing Examiner J. Earl Cox, dismisses charges that General Foods violates Sec. 2(d) of the law in giving ICWDs payments or allowances for making deliveries of General Foods' products to its direct buying customers.

General Foods Corp., whose headquarters are at 250 North St., White Plains, N. Y., sells more than $500 million of food products annually. The firm's products, which include Maxwell House Coffee, Grapenuts, Post Toasties, Baker's cocoa, Jello, and a variety of well-known items, are institution packed for quantity users—hotels, restaurants, lunchrooms and the like—and grocery-packed for retail distribution through grocery stores.

The Commission found that in the institution business ICWDs receive a discount of 2¢ per pound of coffee and 10% on other products, while competing wholesalers receive only the customary cash and quantity discounts. Quoting with approval from the examiner's opinion, Chairman Gwynne said the conventional wholesalers' annual profit "often depends upon their ability to take advantage of cash and quantity discounts. Under these conditions a differential of 2¢ favoring their competitors is substantial, and one of 10% becomes vital."

Chairman Gwynne concluded: "We agree with the . . . hearing examiner that 'the effect of respondent's price discrimination, on a nationwide basis, has been to lessen competition and to injure, destroy and prevent competition.' "

The opinion states that in 1946 General Foods, dissatisfied with its share of the institution pack market, entered into contracts with ICWDs. These independent dealers, usually operating directly from their trucks to the institution, were to receive the favored discounts for performing a variety of services, including aggressive selling, maintenance of adequate stocks, handling of damaged products and arrangment for use of display and promotional material and for demonstrations.

General Foods had maintained, on appeal, that the discounts allowed were payments for services rendered and were properly made under Section 2(d) of the Clayton Act.

FTC v. *United Cigar-Whelan Stores Corp., et al.* (FTC Dkt. 6521-6525, Complaints, March 12, 1956).

Sales promotion arrangements between a large retail drug chain and its suppliers resulting in discrimination against competing retailers were attacked today by the Federal Trade Commission.

The Commission issued complaints against United Cigar-Whelan Stores Corp., Brooklyn, N. Y. (6525), and four suppliers who paid United-Whelan a total of $38,000 in 1954 for participation in television shows sponsored by it.

The suppliers and their principal products are:

Bymart-Tintair, Inc., Newark, N. J., and New York City (6521)	Tintair, Touch-Up and Lightening Change (Hair Tints)
Serutan Co., Newark, N. J. (6522)	Serutan and a "dieting aid," R.D.X.
Johnson & Johnson, New Brunswick, N. J. (6523)	Surgical dressings, first aid kits and baby products
Anahist Co., Inc., Yonkers, N. Y. (6524)	Anahist Tablets and Hist-O-Plan

The suppliers are charged with giving special allowances to United-Whelan in return for advertising on the T. V. shows without

making such allowances available to competing customers on "proportionally equal terms." Sec. 2(d) of the Clayton Act as amended by the Robinson-Patman Act outlaws this practice.

United-Whelan, with 1,350 retail stores, is charged with inducing or receiving these allowances which it "knew or should have known" were not being offered to its competitors. This, the complaint charges, is an unfair method of competition in violation of Sec. 5 of the FTC Act.

The complaint against United-Whelan also includes Product Advertising Corp., its wholly owned subsidiary and advertising agency. The compaint alleges the firms negotiated contracts with suppliers to participate in the programs, Whelan's Playhouse, Whelan's Film Playhouse or Whelan's Cavalcade of Stars. In return for inclusion in the commercials each supplier contributed to the cost of the program in which its products were featured.

The complaint states that in 1954, 57 suppliers entered into this plan and paid an aggregate of $363,000 to United-Whelan.

Many of the suppliers, including the four cited, the complaint concludes, failed to give proportionally equal treatment to other customers.

FTC v. *Elmo, Inc.* (FTC Dkt 6443, Consent Order, March 14, 1956).

The Federal Trade Commission issued a consent order prohibiting Elmo, Inc., Philadelphia, Pa., from discriminating among customers in granting of sales promotion aid. The action was the Commission's adoption of an initial decision by Hearing Examiner Everett F. Haycraft approving a consent agreement by the firm and counsel supporting the complaint.

The order follows an FTC complaint charging the firm with failure to make promotional allowances and services available to competing customers on proportionally equal terms. Equal treatment of custofers is a requirement of the Robinson-Patman Amendment to the Clayton Act. Sec. 2(d) requires that they be given proportionally equal allowances for their promotional activity and Sec. 2(e) requires that they be furnished proportionally equal promotional services.

The complaint was issued November 8, 1955.

The order specifically requires that competing customers be given proportionally equal payments for advertising, display and demon-

strator services and be furnished demonstrators on a proportionally equal basis.

The agreement is for settlement purposes only and does not constitute an admission by the firm that it has violated the law.

FTC v. *Scovill Mfg. Co.* (FTC Dkt. 6527, Complaint, March 21, 1956).

The Federal Trade Commission charged the nation's largest manufacturer of safety and common pins with acquiring a principal competitor in violation of the anti-merger law.

A Commission complaint alleges that the April, 1955 acquisition by Scovill Manufacturing Co., of DeLong Hook & Eye Co., "may have the effect of substantially lessening competition or tending to create a monopoly" in the industry in violation of Sec. 7 of the Clayton Act.

Scovill had combined sales in 1954 of $110 million and sales in pins of $3,300,000. DeLong, in the year ending March, 1955, sold over $2 million in all products and $777,000 in pins.

The complaint charges that by the acquisition Scovill "has eliminated one of the principal competitors in the production and sale of safety pins and common pins in the United States."

The parties are granted 30 days in which to file answer to the complaint. A hearing is scheduled May 28, at Waterbury, Conn., before an FTC hearing examiner.

The Celler Committee

Representative Emanuel Celler (D., N. Y.), Chairman of the House Committee on the Judicary, commenced extensive hearings February 27, on monopoly problems in industries which are under the jurisdiction of Federal regulatory agencies. Industries to be examined by the subcommittee includes airlines, television, power, railroads, and shipping.

He stated that the subcommittee is examining the operations of the Civil Aeronautics Board, the Federal Communications Commission, the Federal Power Commission, the Interstate Commerce Commission, and the Federal Maritime Board to determine, among other things, whether they have discharged their statutory responsiblities where appropriate, in favor of competition rather than monopoly.

These agencies, he said, were created by Congress to protect the public interest by regulatory means as vigorously as the antitrust laws are intended to protect public interest in relation to the economy generally. Congress, therefore, delegated to Federal agencies authority to limit the admission of new competitors; to approve mergers of competitors if appropriate antitrust criteria are satisfied; and to sanction competitor collaboration in fixing rates and charges.

Mr. Celler added that Congress also decided that while completely unfettered competition is not possible in this area, nonetheless competitive considerations must play a prominent role in the agencies' administration of its statutory authority. Whether they have in fact paid due regard to these considerations or whether they have become unduly industry-oriented and sanctioned excessive economic concentration will be carefully explored by the subcommittee, he stated.

In the domestic and international segment of the airlines industry he said, the subcommittee seeks to determine (1) whether the CAB has administered the statute in a manner consistent with maintaining competition to the extent necessary to assure the sound development of an air transportation system; (2) whether there is an undue concentration in any segment of the industry; (3) the extent to which the Board has applied competitive considerations in approving or disapproving proposed mergers; (4) collaboration by competitors in rate-making; (5) whether the Board has exercised its rate-making authority in a manner consistent with competitive objectives; and (6) whether the exemption from the antitrust laws that is written into the Civil Aeronautics Act has had any effect on the level of passenger and freight rates.

In television, Mr. Celler said, the subcommittee is seeking to determine whether the Federal Communications Commission has utilized its regulatory powers in accordance with the Congressional policy of providing a nation-wide competitive system of broadcasting. He said that the subcommittee will explore into Commission policies and network practices to determine whether the networks have attained a dominant position in the industry to a point that may be inconsistent with antitrust objectives. The subcommittee will also explore the VHF-UHF problem to ascertain whether existing policies and practices may thwart the congressional objective of a nation-wide competitive system of broadcasting.

The Kilgore Committee

Since the death of Senator Harley M. Kilgore, the Chairman of the Senate Subcommittee on Antitrust and Monopoly, Senator O'Mahoney has been appointed as acting chairman of the Subcommittee. It will be recalled that Senator O'Mahoney was appointed acting chairman during the illness of the late Senator Kilgore. Senator O'Mahoney is very well acquainted with the antitrust laws and his appointment pleases many of the antitrust bar.

The Sparkman Committee

Motion Picture Distribution Problems

The problems of independent motion picture exhibitors were the subject of hearings held by the Subcommittee on Retailing, Distribution, and Fair Trade Practices under the chairmanship of Senator Hubert H. Humphrey. The hearings were the first in a series undertaken by the Subcommittee to update similar hearings conducted in 1953 and were devoted to receiving testimony from representatives of the country's major exhibitor organizations including Allied States Association of Motion Picture Exhibitors (Allied), Theatre Owners of America, Inc. (TOA), and Independent Theatre Owners Association, Inc. (ITOA).

Abram F. Myers, Chairman of the Board of General Counsel of Alllied, stated that the current shortage of feature films and excessive film rentals are the most troublesome problems facing exhibitors today. Commenting on the industry-wide plan for arbitration which has recently been under study by distributors and exhibitors and noting that it does not provide for the arbitration of film rentals, Mr. Myers, stated, "Allied has consistently taken the position that the problem of excessive film rentals towers above all others and that any arbitration system which does not provide for the arbitration of disputes involving the fairness and reasonableness of film rentals and distribution policies would be of no substantial benefit to exhibitors." With respect to the reductions in admissions taxes enacted by Congress in 1954 Mr. Myers cited "the film companies' sudden rise to opulence following tax relief as evidence that those companies took advantage of the starved film market to impose on exhibitors terms and conditions of license that nullified the relief Congress intended they should have."

Trueman T. Rembusch, former president of Allied and currently the owner-operator of fourteen theatres in Indiana, quoted statistics to support Mr. Myers' assertion relative to the dwindling supply of feature films. According to Mr. Rembusch there were 568 feature films released by Hollywood in 1941, 372 in 1947 and just 271 in 1955. He stated, "Hand in and with the artificial shortage of pictures, in about 1950 there was developed a new philosophy of industry economy, a philosophy aimed at changing the theatre from a 'mass' to a 'class' entertainment medium. . . . The short pictures market enabled the distributors to impose pressure on theatres to increase admission prices."

Ruben Shor, President of Allied, urged the Committee to lend its support to the two major proposals of Allied, namely an industry-wide arbitration system that would include arbitration of film rentals and approval for the divorced theatre circuits to engage in the production and distribution of films.

Benjamin N. Berger of Minneapolis, a director of Allied, asserted that "the selling policies of the major film companies are preventing thousands of theatres from showing many of the finest motion pictures and are preventing millions of Americans, especially in the low income brackets, from seeing those pictures." He urged "the Congress to assert its constitutional prerogative and provide for the lawful regulation of interstate commerce in films by an appropriate government agency."

Julius Gordon, Secretary of Allied and the operator of 55 theatres in Texas, told the Subcommittee of his recent survey of the motion picture industry in several European countries. As evidence of the alleged discrimination by American film producers against domestic exhibitors he stated that he found motion pictures playing in European cities at rentals of 35% of the gross while the same pictures were costing American exhibitors 60%. He also testified to film rental controls in effect in Italy, France and England to support his suggestion for similar controls in the United States.

Myron Blank, President of TOA, asserted that "production's advantages lie in the decreasing supply of pictures and in the forcing of higher film rentals upon exhibitors. This means that exhibitors are new being forced to pay higher and higher rentals for fewer and fewer pictures—which ultimately must result in financial disaster for exhibitors." He joined with witnesses for Allied in urging the

Subcommittee's support for arbitration of film rentals and permission for the divorced circuits to product pictures in order to alleviate the present shortage.

Harry Brandt, President of ITOA, an exhibitor organization active in the New York City area, took sharp issue with Abram Myers of Allied on the question of arbitration and said Myers "has merely paid lip-service to intra-industry efforts seeking solution of trade problems within the confines of the business." He asserted that Myers' "main interest is to keep the industry in a constant state of turmoil and, at that, he has succeeded only too well." To alleviate current exhibitor problems Mr. Brandt urged the Subcommittee to: (1) oppose any legislation looking toward Government regulation of the motion picture industry; (2) encourage the creation of new producing companies; (3) support industry appeals for complete repeal of admissions taxes; (4) assist exhibitors in obtaining loans from the Small Business Administration; and (5) repeat its 1953 recommendation for the establishment of an industry-wide system of arbitration.

The Subcommittee expect to hear distributor representatives at additional hearings to be scheduled at a later date.

Civil Penalties Bill

A bill providing civil penalties for criminal antitrust violations was introduced by Sen. Hubert H. Humphrey. The measure states that corporation officials who authorize acts which constitute criminal violation of the antitrust laws shall be liable to forfeit to the United States an amount equal to twice their compensation covering the period during which such violation occurred. This forfeiture shall be recovered in a civil action by the United States. Additionally, the bill provides that such officials may be enjoined, at the court's discretion, from rendering any service to their company, permanently or for a specific period of not less than 90 days, and from receiving any compensation during such period.

In introducing the measure, Senator Humphrey pointed out that businessmen, under present law, have little reason to fear any punitive action being taken against them for antitrust violations. With the exception of some early cases involving labor unions and business racketeering, in the entire 66-year history of the Sherman Antitrust Act only three men have ever actually served jail sentences for infractions of this law. Fines imposed upon individuals for criminal

violations of the antitrust statutes over the past 14 months have averaged only $1,294 per person.

Senator Humphrey declared: "Because of the difficulty in obtaining enforcement of the criminal provisions of the antitrust laws, the bill which I am introducing provides civil penalties which do not brand violators as criminals nor involve the stigma that attends indictment and conviction. . . . It is my opinion that the principle of direct civil liability of responsible corporate officials would do much to make the antitrust laws more effective. It is one thing to impose a fine on a giant corporation . . . it is quite a different matter when the penalties may be imposed upon an individual who is responsible for his corporation's policies and action."

Legislation

TEXT OF PRE-MERGER NOTIFICATION BILL

H. R. 9424

(As reported, with amendments, by the Committee on the Judiciary, House of Representatives, March 15, 1956.)

A Bill to amend the Clayton Act, as amended, by requiring prior notification of corporate mergers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections 7 and 15 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (38 Stat. 731 and 736, as amended, 15 U. S. C. 18 and 25) are amended as follows:

SECTION 1. That section 7 of said Act is amended by striking the first, second, and third paragraphs and inserting in lieu thereof the following new paragraphs:

ACQUISITIONS OF STOCK OR ASSETS BY CORPORATIONS, INCLUDING BANKS

"No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission and no bank,

banking association, or trust company shall acquire, directly or indirectly, the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country the effect of such acquisition of such stock or assets, or the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

Advance Notice of Acquisitions—Penalties—Waiver of Waiting Period

"No corporation subject to the provisions of this Act shall acquire, directly or indirectly, the whole or any part of the stock, other share capital or assets of one or more corporations engaged in commerce, where the combined capital, surplus, and undivided profits of the acquiring and acquired corporations are in excess of $10,000,000 until ninety days after delivery to the Commission or Board vested with jurisdiction under the first paragraph of section 11 of this Act and to the Attorney General of notice of the proposed acquisition. Such notice shall set forth the names and addresses, nature of business, products or services sold or distributed, total assets, net sales, and trading areas of both the acquiring and the acquired corporations. The parties shall furnish within thirty days after request therefor, such additional revelant information as may be required by the Commission or Board vessel with jurisdiction under section 11 of this Act or by the Attorney General. Any corporation willfully failing to give the notice or to furnish the required information shall be subject to a penalty of not less than $5,000 or more than $50,000, which may be recovered in a civil action brought by the Attorney General. Failure by the Federal Trade Commission, the Attorney General or other appropriate agency to interpose objection to such acquisition within the ninety-day period shall not bar the institution at any time of any action or proceeding with respect to such acquisition under any provision of law. The Commission or Board vested with jurisdiction under section 11 of this Act, after consultation with and upon approval of the Attorney General, may establish procedures for the waiver of all or part of the waiting requirement in appropriate cases.

Exceptions to Notice Requirement

"The preceding paragraph shall not apply to corporations purchasing stock solely for investment when the stock acquired or held does not exceed 5 per centum of the outstanding stock or other share capital of the corporation in which the investment is made; nor to the acquisition by one corporation of the assets of any other corporation if such assets do not equal more than the sum of $5,000,000 or more than 5 per centum of the capital, surplus, and undivided profits of either the acquired or the acquiring corporation, whichever is less. The term 'assets' as used in this paragraph shall not include stock in trade sold or held for sale by a corporation in the ordinary course of its business.

Acquisitions Solely for Investment

"Except for the provisions of the two preceding paragraphs this section shall not apply to corporations purchasing stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition."

FTC Anti-Merger Injunctions

Sec. 2. That section 15 of said Act is amended by inserting after the first paragraph thereof the following paragraph:

"Whenever the Federal Trade Commission has reason to believe—

"(1) that any corporation subject to its jurisdiction is acquiring or has acquired stock or assets of another corporation in violation of the provisions of section 7 of this Act; and

"(2) that the enjoining of such acquisition or the maintenance of the status quo after acquisition pending the issuance of a complaint or the completion of proceedings pursuant

> to a complaint by the Commission under this section and until such complaint is dismissed by the Commission or set aside by the court on review, would be to the interest of the public,

the Commission, by an of its attorneys designated by it for such purpose, may bring suit in a district court of the United States to prevent and restrain violation of section 7 of this Act or to require maintenance of the status quo. Any such suit may be brought in any district in which the acquiring or the acquired corporation resides or transacts business. Upon proper showing, a temporary injunction or restraining order shall be granted without bond. In any case where injunction or restraining order is granted under this paragraph, the Federal Trade Commission shall proceed as soon as may be to the issuance of the complaint and to the hearing and determination of the case."

Report of House Judiciary Committee

(Report of the Committee on the Judiciary, House of Representatives, Report No. 1889, 84th Congress, 2nd Session, March 15, 1956.)

Report

The Committee on the Judiciary, to whom was referred the bill (H. R. 9424) to amend the Clayton Act, as amended, by requiring prior notification of certain corporate mergers, having considered the same, report favorably thereon with amendments and recommend that the bill do pass.

The amendments are as follows:

1. Page 3, line 2, after the period following the words "Attorney General." insert the following sentence:[1]

> Any corporation willfully failing to give the notice or to furnish the required information shall be subject to a penalty of not less than $5,000 or more than $50,000, which may be recovered in a civil action brought by the Attorney General."

2. Page 3, line 19, after the word "than" strike out the language on lines 19, 20, and 21, and insert the following in lieu thereof:[2]

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[1] Section 1 of bill, 3rd paragraph, 4th sentence.

[2] Section 1 of bill, 4th paragraph; the phrase, "5 per centum of the capital surplus, and undivided profits of either the acquired or acquiring corporation, or the sum of $5,000,000," was deleted.

the sum of $5,000,000 or more than 5 per centum of the capital, surplus, and undivided profits of either the acquired or the acquiring corporation, whichever is less. The term "assets" as used in this paragraph shall not include stock in trade sold or held for sale by a corporation in the ordinary course of its business.

3. Page 4, line 7 after the comma following the word "corporation," strike out the language on lines 7, 8, 9, 10, and line 11 down through the word "corporations." [3]

Purpose of Amendments

The first amendment is designed to insure compliance by imposing a civil penalty ranging from $5,000 to $50,000 for willful failure to provide advance notification or to submit the required information. The second amendment makes it clear that a sale or purchase of property in the ordinary course of business is not subject to advance notification. The other amendments are merely formal and correctional.

Purpose

H. R. 9424 amends section 7 by requiring that, where the combined capital structure of parties to a proposed merger exceeds $10 million, the acquiring corporation must notify the Attorney General and the Federal Trade Commission (or the appropriate commission or board vested with jurisdiction) 90 days in advance of the transaction. Together with the notice, the acquiring corporation must also supply the Attorney General and the appropriate agency with specifically enumerated information which would enable them to assess the merger's probable impact on competition. During this 90-day period the merger could not take place, although in appropriate cases this prohibition could be waived. The waiting period requirement would not operate, however, to bar an agency from instituting proceedings at a later date. The merging corporations would also be required to furnish the appropriate agencies with such additional relevant information as may be requested within 30 days. Willful

[3] Section 1 of bill, 5th paragraph, 2nd sentence; the phrase, "for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations," was deleted.

failure to submit the notification or furnish the required information is subject to a civil penalty of from $5,000 to $50,000.

Premerger notification would not be necessary (1) where stock is acquired solely for investment and does not exceed 5 percent of the outstanding share capital of the corporation in which the investment is made; (2) where the assets acquired do not exceed $5 million or 5 percent of the capital structure of either the acquiring or acquired corporation, whichever is less; and (3) where the assets acquired are stock in trade or sold or held for sale by the corporation in its ordinary course of business.

The bill would also amend section 15 of the Clayton Act to provide the Federal Trade Commission with authority to seek a district court order preventing and restraining violation of section 7 pending issuance of a complaint and completion of the Commission's administrative proceeding. This would give the Federal Trade Commission, which has concurrent jurisdiction with the Attorney General to enforce section 7 of the Clayton Act, authority similar to that already possessed by hte Attorney General to seek a preliminary court injunction to restrain the consummation of a merger pending adjudication of its legality.

Reasons for Bill

Premerger notification has the approval of the President, the Department of Justice, and the Federal Trade Commission.

Experience over a period of 5 years in administering section 7 of the Clayton Act, as amended in December 1950, by the Celler-Kefauver Act, has demonstrated a basic need for requiring companies to provide advance notification of merger plans to the Attorney General and the Federal Trade Commission or other appropriate body. At the present time, the staff of the antitrust enforcement agencies must rely upon newspapers, financial periodicals, trade journals, and other publications for information regarding proposed mergers which the companies themselves could readily supply. These procedures are quite unsatisfactory, especially since many significant mergers are not publicized in advance of consummation.

The enforcement agencies also are confronted with the problem of collecting elementary information about the companies involved in a proposed merger in order to determine the merger's impact upon competition and whether a full investigation should be made. This in-

formation includes the nature of the business of the merging companies, the products and services sold or distributed, the total sales, the total assets, net sales, and trading areas of both the acquiring and acquired corporations. While this type of information is ordinarily requested from the companies, at present they have no legal obligation to furnish the information requested, or to make it available expeditiously.

Not only will the bill obviate the considerable time, effort, and investigative expense required to determine whether mergers are about to occur, it would make unnecessary the haphazard methods of scanning newspapers and trade publications in order to determine where merger threats to competition are arising. It will also enable the antitrust agencies to be informed of mergers not publicly announced before consummation. Particularly important, advance notice will afford the enforcement officials a reasonable period of time in which to study the competitive implications of a merger before deciding whether to seek a preliminary injunction restraining its consummation pending a determination of legality.

Beyond that, testimony before the committee indicates that evenhanded enforcement requires notification. With that requirement incorporated in the statute, the company that tries to obey the law and seek advance clearance from the Department of Justice or the Federal Trade Commission will no longer stand by and watch its competitor who chooses to remain silent, consummate a merger and thereafter rely on the natural indisposition of the enforcement agency to bring a suit to unscramble the commingled assets at some later time.

The force of these considerations was recognized by the President in recommending enactment of a premerger notification requirement. His Economic Report transmitted to the Congress, January 24, 1956, urges revision of antitrust legislation so that—

> all firms of significant size that are engaging in interstate commerce and plan to merge should be required to give advance notice of the proposed merger to the antitrust agencies, and to supply the information needed to assess its probable impact on competition (pp. 78-79).

At the same time no burden is imposed upon small business mergers since premerger notification is required only where the combined capital, surplus, and undivided profits of the acquiring and acquired

corporation are in excess of $10 million. This figure was recommended by the Department of Justice and the Federal Trade Commission and will probably cover most mergers that have a significant economic effect. Of course, there may be mergers which have a substantial effect on competition, where the aggregate capital structure is less than $10 million. While these would not have to be reported, the antitrust authorities would not be foreclosed against taking action. The committee agrees with the agencies that the possibility of such transactions having a substantial competitive effect does not justify burdening all corporations with notification and reporting requirements.

Further minimizing the possibility of hardship, the bill authorizes the enforcement agencies to waive the 90-day period in appropriate cases. For example, if a corporation is in bankruptcy and a quick sale of the assets is proposed, no good purpose would be served by requiring a waiting period of 90 days, assuming the transaction will have no competitive significance. There may be a wide variety of other types of transactions where no possible antitrust implication is involved and where a waiting period is therefore unnecessary. In these circumstances it is the specific intention of the committee that the waiver procedures prescribed by the bill will be fully utilized by the agencies.

Equally necessary, as Federal Trade Commission Chairman Judge Gwynne testified, is the provision giving the Federal Trade Commission authority to seek a preliminary court injunction to prevent consummation, to preserve the status quo until completion of administrative proceedings before the Commission.

The authority sought is similar to that which the Federal Trade Commission now has in certain cases under section 13 of the Federal Trade Commission Act. It is also similar to the authority of the Department of Justice under section 15 of the Clayton Act, which authorizes the Attorney General to seek injunctive relief in the Federal courts to prevent and restrain violations of the Antimerger Act (sec. 7). Since the Federal Trade Commission has concurrent responsibility with the Atorney General to enforce that act, logic and policy dictate that the Commission have coextensive authority to invoke the injunctive powers of a district court upon an appropriate showing of necessity. The necessity for this is underscored by the fact that the Commission now lacks authority which even private parties have to petition a Federal district court to enjoin the consummation of a reasonably

probable illegal merger in order to avert irreparable injury. (See *Hamilton Watch Co.* v. *Benrus Watch Co.*, 114 F. Supp. 307 (D. Court 1953), affirmed 206 F. (2d) 738 (2d Cir. 1953).)

Lack of a provision to enable the Commission to prevent mergers prior to consummation or, after consummation, to take action to preserve the status quo until completion of proceedings, has created a serious loophole in the Celler-Kefauver Antimerger Act. Without such a provision, companies can obtain the benefits of a completed merger even though its legality has been challenged by the Federal Trade Commission. This is true notwithstanding the fact that pending final disposition of the complaint, the merger may have caused the very damage to the competitive structure of the industry which the Antimerger Act was intended to safeguard. Then, too, in many mergers the acquired competitor is completely swallowed up and disappears as an identifiable entity, making it practically impossible hereafter to restore completely the preexisting competitive situation.

Under these circumstances while premerger notification is a necessary preliminary step, it is just as important to provide the corollary power to seek an injunction preventing the commingling of the assets, management, and productive facilities to a point where they cannot be effectively unscrambled.

The provision may well benefit the business community itself since, as the testimony indicates, representatives of some merging companies have advised that disruption of business plans is lessened by agency action before merger consummation. In fact, some companies take the position that if the agencies are to proceed at all, they should sue before consummation.

Explanation of H. R. 9424

The first paragraph of section 1 of the bill is identical with the first paragraph of section 7 of the Clayton Act as proposed to be amended by H. R. 5948 (the Celler bank-merger bill) which was approved by the House on February 6, 1956, and is now pending Senate action. That bill, it will be recalled, plugs a loophole in section 7 by making its provisions applicable to a bank acquiring the assets of another bank where the effect may be substantially to lessen competition or tend to create a monopoly.

The second paragraph is a new provision. It requires that if a corporation proposes to acquire the stock or assets of another corpo-

ration, where the combined capital, surplus, and undivided profits of the two exceed $10 million, it must notify the appropriate commission or board, as well as the Attorney General, 90 days in advance of the transaction. The notice must set forth the names and addresses, nature of business, products or services sold or ditributed, total assets, net sales and trading areas of both the acquiring and the acquired corporations.

Under this provision corporations subject to the jurisdiction of the Federal Trade Commission (*i.e.*, nonregulated corporations) would have to furnish notification to the Federal Trade Commission and the Attorney General. On the other hand, corporations subject to the jurisdiction of Federal regulatory agencies would have to notify the appropriate regulatory body and the Attorney General. Common carriers, for example, would notify the Interstate Commerce Commission and the Attorney General; air carriers, the Civil Aeronautics Board and the Attorney General, etc.

Premerger notification by regulated corporations is deemed particularly necessary by the Department of Justice since the Attorney General has a statutory right, provided by section 11 of the Clayton Act, to intervene and apear in merger proceedings by commissions and boards.

Pursuant to this paragraph the merger cannot take place until 90 days after delivery to the appropriate commission or obard and the Attorney General, of the notice which must contain specifically enumerated information. This means that the 90-day period will begin to run only after the acquiring corporation has provided the appropriate agencies with the names and addresses, nature of business, products or services sold or distributed, total assets, net sales and trading areas of both the acquiring and acquired corporations. Submission of part rather than all of this information would not constitute "delivery * * * of notice of the proposed acquisition" as contemplated by the provision. Should the parties seek to consummate the transaction without complete compliance with the provision, the injunctive sanctions of section 15 of the Clayton Act as proposed to be amended by this bill would be fully available. These sanctions would be in addition to the civil penalty provisions of the bill which could be invoked if the failure to give notice or to furnish required information was willful.

Beyond filing notice of the proposed merger, the parties would be required to furnish additional, relevant information within 30 days after delivery of a request therefor. It is the intention of the committee that this request for additional information will be made by the enforcement agencies in sufficient time so that the necessary data is supplied before the 90-day waiting period has elapsed.

Since section 7 contemplates concurrent enforcement, it is particularly necessary that the agencies coordinate their efforts to avoid duplicating requests for additional information. Agency coordination is also expected in establishing procedures for the waiver of all or part of the waiting period in appropriate cases.

The third paragraph of the bill is also a new provision. It makes it clear that a transaction which is not in essence a merger or its equivalent is not subject to advance notification. Thus, if one corporation purchases stock in trade sold or held for sale by a corporation in the ordinary course of its business, notice would be unnecessary. The paragraph also makes it clear that routine acquisitions of stocks or assets not involving tranfer of control are also beyond the notification provisions. Accordingly notice is unnecessary where a corporation purchases stock of another corporation solely for investment when the stock acquired or held does not exceed 5 percent of the outstanding stock or other share capital of the corporation in which the investment is made. Notice is also unnecessary where the assets acquired are less than 5 percent of the capital, surplus, and undivided profits of either the acquired or acquiring corporation or $5 million, whichever is less. To illustrate, even if the assets to be acquired are less than 5 percent of the capital structure of either corporation but more than $5 million, notice would be necessary, assuming that the combined capital of the two corporations exceeds $10 million.

The fourth paragraph of the bill is the same as the third paragraph of present section 7 except for the addition of the words "except for the provisions of the two preceding paragraphs." These words are added to make it clear that in the event a corporation purchases for investment more than 5 percent of the stock of another corporation, and if the combined capital of the two exceeds $10 million, the acquiring corporation must notify the agencies of the transaction. But, as under present law, if the stock is in fact used solely for investment and not to bring about, or in attempting to bring about, a substantial

lessening of competition, the transaction is not in violation of section 7 of the act.

The remainder of the paragraph is the same as existing law and makes it clear that the formation by a corporation of subsidairy corporations or the ownership of stock in such subsidiaries is not illegal when the effect is not substantially to lessen competition.

Section 2 of the bill authorizes the Federal Trade Commission to bring suit in the United States district court, before a merger is consummated, to restrain and prevent violations of section 7. It also authorizes the Federal Trade Commission to seek maintenance of the status quo after the merger has been completed. The restraining order would be in effect pending the issuance of a complaint or the completion of proceedings by dismissal of the complaint. It is the intent of the committee that the premerger injunctive authority will be used to the fullest extent by the Commission and not merely in isolated cases. Likewise, it is expected that the Attorney General similarly will invoke the premerger injunctive remedy provided by existing section 15.

Suit under this provision could be brought in any district where the acquiring or acquired corporation resides or transacts business. Upon proper showing a temporary injunction could be granted without bond. If a restraining order is granted, the Federal Trade Commission is required to proceed as soon as may be to a hearing and determination of the case.

TEXT OF DECLARATION OF ANTITRUST POLICY BILL

H. R. 9762

(as introduced by Mr. Celler and referred to the Committee on the Judiciary, March 6, 1956.)

A BILL to amend the Sherman Act to declare the primacy of free enterprise, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act of July 2, 1890 (ch. 647, 26 Stat. 209) Fifty-first Congress, first session (15 U. S. C., sec. 1 and the following), as amended, is further amended by inserting immediately before section 1 thereof the following:

Declaration of Policy

It is the policy of the United States that to the maximum extent practicable the principles of free private enterprise embodied in the antitrust laws shall be maintained. All officials, agencies, boards, and commissions authorized by Congress to regulate business and industry shall discharge their statutory responsibilities in a manner to give the maximum effect to this policy.

No official, agency, board, or commission authorized under any provision of law to approve arrangements involving exemption from the antitrust laws shall grant approval of such exemption unless the official, agency, board, or commission finds that it is impracticable to discharge statutory responsibilities in a manner consistent with the antitrust laws.

Where Congress has authorized any official, agency, board, or commission to restrict entry into an industry such authority shall be exercised in a manner to give the maximum effect practicable to the objectives of the antitrust laws.

Unless any provision of law expressly provides otherwise, no proceeding instituted by the United States in the courts of the United States charging violation of the antitrust laws shall be barred or stayed for the reason that any official, agency, board or commission has jurisdiction or is exercising jurisdiction over some or all of the activities included in the alleged antitrust violation.

Bar and Economic Activities

American Bar Association

The Section on Antitrust Law of the American Bar Association is holding its annual meeting in Washington, D.C. on April 5 and 6, 1956. This year, the meeting will take place at the Mayflower Hotel. Last year, as many recall, the meeting took place at the Statler Hotel and excitement ran high because of release the prior day of the Report of the Attorney General's National Committee to Study the Antitrust Laws. May we urge the members of the antitrust bar to attend. We shall be there and look forward to the opportunity of personally meeting many of the antitrust bar whose interest and support have

aided and inspired the editors of this publication in their efforts to constantly improve your ANTITRUST BULLETIN.

ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

The Section on Trade Regulation of the Committee on Post-Admission, Legal Education of the Association of the Bar of the City of New York will hold a meeting on April 11, 1956 at 8 P. M. at the House of the Association, 42 West 44th Street, New York City. The title of the meeting is *Some Current Antitrust Problems in Distribution.* Charles F. Barber, Assistant to the Solicitor-General of the U. S. will discuss *Refusals to Deal* and Earl W. Kitner, General Counsel to the Federal Trade Commission will cover *Exclusive Dealing Arrangements.*

The last meeting of the season to be presented by this association will present Professor Milton Handler in his annual review of Trade Regulation developments on June 16, 1956. Professor Handler's review was originally scheduled for May 16, but has been postponed and the June date has now been set.

MILWAUKEE BAR ASSOCIATION and MARQUETTE UNIVERSITY SCHOOL OF LAW

The House Counsel Committee of the Milwaukee Bar Association and Marquette University Law School are offering a five week course on the Robinson-Patman Act and the Wisconsin Antitrust Laws for attorneys, business managers and sales executives.

Book Reviews

Adams, Walter, and Gray, Horace M., MONOPOLY IN AMERICA: THE GOVERNMENT AS PROMOTER, Macmillan (1955), Pp. 221, $3.50

Antitrust lawyers, accustomed to working in a field in which the role of the government is largely the enforcement of laws against monopoly, may be surprised to find the government itself charged with being a promoter of monopoly. That is, however, the chief point made by the authors in this provocative book. Economic concentration, they say, is not the result of deterministic economic forces, but is the product of governmental actions and policies.

Without seeking to offer an exhaustive analysis of the subject, the authors cover the principal fields in which they believe that govern-

ment policy is misguided in promoting monopoly. Public utility regulation is said to be one of the worst devices for dealing with monopoly. Here the government abdicates some of its power in favor of the monopoly it supports. The community becomes dependent upon the monopoly, which finally comes to control the agency set up to regulate it. These criticisms are applicable not only to the traditional public utilities, but also to the more numerous business fields in which entry is now controlled by the necessity of a government license or permit.

The tax system is said to encourage monopoly in various ways, particularly through the special favors allowed to certain business by depletion allowances, rapid amortization privileges and similar provisions.

Also government spending, through the purchase of goods and services, and subsidy through tariff favors and purchases at excess cost favor monopolization. In both defense procurement and the disposal of war surplus productioin facilities the executive agencies are charged with unduly favoring big business, and, despite Congressional directives and pious statements to the contrary, ignoring the legitimate role of small business and the wise policy of diffusion of economic power and dispersal of facilities.

The authors find in all these events evidence of an ambivalent attitude on the part of the government toward monopoly, and of a gradual but unmistakable retreat from our traditional anti-monopoly policy. They fear that the public attitude of opposition to monopoly is being eroded gradually. Their charge is not a partisan one, as the administrations of both parties bear responsibility for instituting and continuing policies which have encouraged economic concentration and discouraged the formation and survival of small business units.

Whether or not any reader agrees with all of the points made by the authors, this book makes a convincing demonstration of at least one basic point: Neither competition, monopoly, nor, for the matter, markets as we know them are "natural" phenomena or can exist in the absence of a social organization of the kind provided by government and laws. Monopoly and competition are forms of organization of certain kinds of power within our social structure. Whether we shall have one or the other, and to what degree, is subject to control through governmental policy and action, but it is not subject to control merely through enforcement of the antitrust laws. The poli-

cies of government in many areas are powerful forces acting in the direction either of monopoly or competiiton. Whether and by what means changes may be wrought in these government policies to encourage greater competition and economic diversity rather than concentration are political questions which are not considered in this book.

Anyone interest in the monopoly problem beyond the strictly legal view will certainly be stimulated to new thought on the subject by the facts and views presented by these two outstanding economists.

—Lee Loevinger

Fusfeld, Daniel R., THE ECONOMIC THOUGHT OF FRANKLIN D. ROOSEVELT AND THE ORIGINS OF THE NEW DEAL, Columbia University Press, New York (1956), Pp. 337, $5.00.

This book represents an interesting addition to the constantly increasing body of literature dealing with the late Franklin D. Roosevelt. Professor Fusfeld (of Hofstra College) sets out to disprove a view which he feels is common among historians—that Roosevelt "had no economic philosophy, knew little about economics, and derived his program of economic legislation either from his advisers or from his ability to grasp the desires of an ever-shifting public opinion."

A rather detailed tracing of F. D. R.'s social background and formal training is presented to show the extent to which this view is incorrect. There rae, of course, certain limits to any attempt to determine from Roosevelt's notebooks and papers the extent of his economic literacy. One can tell, of course, the type of thought to which he was exposed: "The Development of the West," taught at Harvard by Frederick J. Turner; "Economics of Transportation" and "Economics of Corporations," taught by William Z. Ripley and (at Columbia Law School) "American Constitutional Law," given by John W. Burgess. But, as most teachers are painfully aware, there is often a great gap between thinking to which students are exposed, and ideas actually absorbed. That Professor Fusfeld realizes this is obvious from his statement (p. 33), "It is not possible to determine what or how much Roosevelt learned from Harvard's economics courses."

Accepting this limitation, the reader can nevertheless gain much insight into the development of F. D. R's economic thinking. Thus, at the age of nine the following appears in young Roosevelt's essay on the common people of Egypt:

> The working people had nothing, they lived in the porches of the temples or in little straw huts. The kings made them work so hard and gave them so little that by wingo! they nearly starved and by jinks they had hardly any clothes! so they died in quadrillions.

Similarly, it seems that F. D. R., by then a law student at Columbia, learned well Professor Burgess' lesson that one of the great advantages of our Constitution is its flexibility (some may feel that this was learned too well). And who in the field of antitrust, remembering the unhappy N.I.R.A. experiment, will not find significance in Professor Fusfeld's conclusion that, faced with monopolistic collusion by leading suppliers, Assistant Secretary of the Navy Roosevelt explored every solution except use of the antitrust laws—a "possibility [which] seems not to have been considered" (p. 61).

Fortunately, Professor Fusfeld's easy style, with the possible exception of some tendency to belabor certain points (the term *noblesse oblige* appears 12 times in a 9 page first chapter), makes the reading of his book an enjoyable as well as an interesting experience.

—Irwin M. Stelzer

Books

Herrymon Maures, GREAT ENTERPRISE, The Macmillan Company, N. Y., 1955, Pp. 303, $5.00.

J. Richard Powell, THE MEXICAN PETROLEUM INDUSTRY, 1938–1950, Berkeley: University of California Press, 1956, Pp. 288, $4.00.

C. Lowell Harriss, THE AMERICAN ECONOMY, Revised Ed., Richard D. Irwin, Inc., Homeward, Illinois, Pp. 781.

Floyd L. Vaughan, THE U. S. PATENT SYSTEM: LEGAL AND ECONOMIC CONFLICT IN AMERICAN PATENT HISTORY, Norman: University of Oklahoma Press, 1956, Pp. 355, $8.50.

Notes

TAGGART COMMITTE REPORT PUBLISHED

The Federal Trade Commission has made public the Taggart Committee report on cost justification under Section 2(a) of the

Clayton Act, as amended by the Robinson-Patman Act. This section prohibits illegal price discrimination in sales to competing customers.

No action on the report was taken by the Commission other than to make it available to all interested parties for study and comment.

The 43-page report was prepared by a seven-man committee headed by Prof. Herbert F. Taggart, Assistant Dean of the School of Business Administration, University of Michigan. Other committee members are: C. R. Fay, Pittsburgh, Pa.; H. T. McAnly, Cleveland, O.; E. W. Kelley, Kansas City, Mo.; and Alvin R. Jennings, Albert E. Sawyer and Otto P. Taylor, all of New York City.

Mass. Fair Trade Law Held Constitutional

The constitutionality of Massachusetts' Fair Trade law was unanimously upheld by the State's Supreme Judicial Court. In the first decision on fair trade by Massachusetts' high court, the right of a manufacturer, in this instance General Electric Company, to guard his trade-mark against unfair competition was confirmed. The court also held that retailers who knowingly sell a fair-traded product are required to observe the manufacturer's minimum fair trade price whether or not the retailers had signed a resale price maintenance contract.

Federal Trade Commission Asked for $951,500 to Step Up Anti-Merger Activities

FTC Chairman John W. Gwynne told the House Appropriations Committee that the Commission wants to examine closely at least 200 proposed mergers during the next fiscal year. He said further that the Commission expects to conduct some 60 field investigations, issue about 12 complaints, and start court proceedings in no fewer than four merger cases. If granted, the money would be used to hire 164 additional lawyers, market analysts, and economists, thus tripling the present size of the Commission's merger enforcement staff. Mr. Gwynne stressed that the FTC must have detailed information on the size, location, and markets for all companies in specifical industries before an anti-merger decision can be made. He also indicated that anticipated legislation requiring advance notice to the Government of proposed mergers, as contemplated in Senator Sparkman's omnibus anti-merger bill, would greatly increase the Commission's antitrust workload.

Georgetown Law School Wins Antitrust Moot Court Case

The Sixth Annual National Moot Court Competition finals were conducted at the House of The Association of the Bar of the City of New York on Wednesday, Thursday and Friday, December 14th, 15th, and 16th, 1955. The team representing Georgetown University Law Center was selected as the National Championship Team. The winning team was composed of Henry St. John FitzGerald, Arlington, Virginia, James E. Hogan, Chicago, Illinois and Francis J. Larkin, Milford, Massachusetts. James E. Hogan won the award for the best individual oral presentation.

This year the case which the participating law students were given to brief and argue on appeal involved a suit by a gasoline company against another gasoline company based on the anti-merger provisions of the Clayton Anti Trust Act seeking damages and equitable relief. The defendant had acquired and merged into itself a company which owned and operated a string of gasoline stations to which plaintiff had formerly sold petroleum products.

Editorial

Congressman Emanuel Celler, the moving force behind H. R. 9424 (the Pre-Notification Merger Bill), invited the Committee on the Clayton Act of the Section on Antitrust Law of the New York State Bar Association to comment upon the provisions of the merger notification bills. Other committees may have similarly been extended this courtesy but it has not been called to our attention. It is quite natural that we should have knowledge of the invitation to the local group here in New York.

The Clayton Act Committee of the New York State Bar Association submitted five prerequisites to Mr. Celler. Of primary concern here is that committee's third recommendation presented to the Congressman in a letter dated February 8, 1956. That prerequisite stated as follows:

> (3) "Intra-corporate transactions, including those of subsidiaries and affiliates with each other and with their parent, should require no advance notification;"

We adopt the view of the New York Committee because it seems obvious to us that where a parent company seeks to merge its sub-

sidiaries together or into the parent company there may be many reasons all pointing to business expediency. If the purpose of such a merger is to substantially lessen competition or to tend to create a monopoly how could such mergers accomplish something violating the antitrust laws that could not have been accomplished prior to the merger? A parent has the power at all times to exercise its influence over a subsidiary as to policy and direction. The merger adds no greater power to the parent for the purpose of a violation under Section 7 of the Clayton Act. To require notification to the government of such proposed merger *could* cause undue hardship on both the merger and the merged.

Perhaps we are blind to a situation that may possibly result violative of Section 7. We would greatly appreciate receiving the views of our readers regarding the intra-corporate merger.

Judge Stanley N. Barnes has passed the Senate Committee of the Judiciary and is on his way to ratification by Congress for approval of his appointment to the bench of the United States Court of Appeals.

Judge Barnes has gained the respect and admiration of the entire antitrust bar. His work as the head man of Antitrust Division has been marked by over three years of vigorous enforcement of the antitrust laws. There are many things we could say in tribute to Judge Barnes but we shall simply say: "good luck—you have done a magnificent job."

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The Antitrust Bulletin

ADVERTISING RATES

Yearly		Single Issue
$104.70	FULL PAGE	$34.90
$ 71.55	HALF PAGE	$23.85
$ 31.95	QUARTER PAGE	$10.65
$125.70	BACK COVER	$41.90
$119.70	INSIDE COVERS	$39.90

Prices are net. No agency commission nor cash discount allowed.

THE ANTITRUST BULLETIN is published four times a year: March, June, September and December.

Circulation is approximately 1100 to lawyers, jurists, corporations, economists, law and university libraries.

MECHANICAL REQUIREMENTS

	Page Size	Live or Type Space
FULL PAGE	9″ x 6″	42 Picas x 26 Picas
VERTICAL HALF PAGE	9″ x 3″	42 Picas x 13 Picas
HORIZONTAL HALF PAGE	4½″ x 6″	21 Picas x 26 Picas
QUARTER PAGE	4½″ x 3″	21 Picas x 13 Picas

Copy and plates should be received by us on the 15th of the month preceding publication. Plates should be blocked. Plates made by Federal Legal Publications billed at cost.

Printed by Letterpress.

Halftone screen: 110.

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95 Morton Street, New York, N. Y. 10014